Exam
50 multiple choice-100 minutes
2 essays-80 minutes
Exam- closed book. But will receive copies of the APA and const. will not include MSAPA. So it will have appendixes A and B
MC similar to reserve questions. But wont have case names on it. not necessary.
Will be around through the exam period to ask questions.
Time- a little more than half MC. But points are really split any particular way.

Intro
1. Policy goals- efficiency, effective, economical. Look to statute, people’s expectations. DP.
2. Critics claim agencies are unresponsive, slow, unfair, inefficient, ineffective.

chapter 2- the constitutional right to be heard
1) Due process, hearings, and mass justice
   i) Administrative procedure is expensive, and reduces funds available to agencies to help people. It also causes delays and
takes up a lot of time and energy that could be better spent helping clients. Question is whether process is always worth
those costs…
   ii) Due process requires the opportunity to be heard “at a meaningful time and in a meaningful manner.”

b) GOLDBERG V KELLY, SC 1970
   i) Facts- no opp for welfare recipient to cross examine or rebut evidence before benefits are terminated. There is an appeals
process afterwards though.
   ii) Issue- whether a state can terminate welfare without the opportunity for an evidentiary hearing prior to termination, or if that
is a DP violation.
   iii) DP applies because it’s a statutroy entitlement. Court did a balancing and said Ps interest in benefits outweighs states
concerns about burdens. Don’t need a judicial hearing, but must have meaningful hearing before benefits are terminated. In
any situation, the opportunity to be heard requires a balancing of interests that must be tailored to the capacities,
competence, and circumstances of those who are to be heard. The demands of procedural due process are flexible and
contextual rather than rigid and abstract.
   iv) Purposes of due process/benefits of trial-type hearing: serves a dignitary function (treats the person as an individual), helps
individual to understand and accept, leads to accurate decisions, creates precedents, empowers people, forces officials to act
seriously and reflectively, helps government exercise discretion wisely, serves the purposes of the substantive programs (e.g.
helping people get welfare benefits, etc.), identifies recurring problems, facilitates judicial review.

2) Interests protected by DP
   i) For DP to apply, liberty interest or property interest must be at stake.
   ii) Liberty denotes not merely freedom from bodily restraint, but also the right of the individual to contract, engage in common
occupations of life, establish a home and bring up children, acquire knowledge, worship, generally enjoy those privileges
long exercised as essential to the orderly pursuit of happiness by free men. It is a very broad concept.
   iii) Property interests are not created by the Constitution. They are created and defined by independent sources, such as state
law. Examples are contracts and rules or understandings that secure benefits and support entitlement. Implied contract
rights can also be protected since they would be under state law (Perry v. Sindermann).

b) BOARD OF REGENTS V ROTH, SC 1972
   i) Facts- Teacher completed one year contract and not rehired. Said entitled to hearing cause of property interest in job or
liberty interest in reputation. Court disagreed. Reputation good trigger liberty interest but not harmed here. no property
interest in job.
   ii) To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it more than a
unilateral expectation. The contract supported absolutely no claim of entitlement.
   iii) Must have a legitimate claim of entitlement. More than just a strong expectation.
   iv) Administrative burdens has led to the change that you now need tangible detriment plus stigma to get DP on reputation
damage. Don’t want DP clause to supercede everything that state law has traditionally done. Could always sue for slander
or liable.

c) Notes-
   i) Paul v. Davis says that a person is not entitled to a hearing when accused of being a shoplifter. Although he was defamed,
he was not deprived of liberty. If the government isn’t doing something tangible, it isn’t “doing” something to him. There
is, however, the “stigma-plus” test, where, for example a person is listed as a drunkard and prohibited from buying alcohol.
The deprivation of the liberty to buy the alcohol is aggravated by the stigma, and liberty deprivation is found.
   ii) Baily v richardson case- held that no DP for govt jobs because they were a privilege and not property.

d) CLEVELAND BOARD OF EDUCATION V LOUDERMILL, SC 1985
   i) Facts- Ps were fired from public jobs without a hearing. Offered post termination hearing 9 months later. They had
property right, but statute giving them their job also had procedures for firing and those procedures were followed.
ii) Issue- whether by statute, states can limit the procedure necessary to take away a statutory entitlement. Court says no. 
violated DP here.

iii) **Rulemaking versus adjudication**

   a) Government action that affects identifiable persons on the basis of facts peculiar to them = adjudication. Government action 
directed in a uniform way against a class of persons = rulemaking. **Procedural due process only applies to adjudication, not** 
rulemaking. **Rulemaking does not require procedural due process.**

   b) Facts- City was paving streets. Afterwards it apportioned costs among individual property owners in district. No oral 
hearings were given. One objection was that cost assessment was arbitrary because not all benefit equally from paving.

   c) Where legislature allows some subordinate body to determine levying tax, DP requires that at some stage of the proceedings 
before the tax is fixed, the TP shall have an opportunity to be heard, of which he must have notice, either personal, by 
publication, or by a law fixing a time for a hearing. Denial of DP here.

   d) Rehnquist dissnet- state law gave prop right and should be able to take it away. Must take the bitter with the sweet.

   e) **Goss v lopez held that as long as deprivation of property is not de minimus DPC applies. The weight of the interest may help** 
determine what process is due though.

3) **Timing of the hearing**

   a) MATHEWS V ELDRIDGE, SC 1976

      i) Facts- had disability benefits terminated before his appeal. Claims that violated his DP rights under goldberg.

      ii) The fundamental requirement of DP is the opportunity to be heard at a meaningful time and in a meaningful manner. But, DP 
is flexible and calls for such procedural protections as the particular situation demands.

      iii) Mathews test- balance three distinct factors- the private interest that will be affected; the risk of erroneous deprivation 
through current procedure and probable value of additional procedural safeguards; the govt's interest including fiscal and 
administrative burdens of additional procedures.

      iv) Court says they have pretty elaborate procedures before benefits are terminated. And balancing the factors shows no DP 
violation when benefits are terminated before a hearing.

4) **Elements of a constitutionally fair hearing**

   a) INGRAHAM V WRIGHT, SC 1977

      i) Issue- whether students can be paddled without opportunity for a hearing and prior notice.

      ii) Hol- corporal punishment in public schools implicates a constitutionally protected liberty interest, but we hold that the 
traditional common law remedies are fully adequate to afford due process.

      iii) Where the state has preserved what has always been the law of the land, the case for administrative safeguards is 
significantly less compelling. Also, tort remedies exist if beatings are too severe. Don’t want to proceduralize schools.

      iv) Broad lesson of ingraham is that state owes you hearing after some kind of deprivation, but the hearing might be 
very minimal or after the fact. Also common law remedies can be counted as part of DP.

   b) Notes-

      i) Horowitz med school case- difference is academic v disciplinary cases. Subjective v objective. Can’t formalize academic 
decisions.

      ii) APA 555(b) and 1981 MSAPA 4-203(b) give a right to retained counsel at trial-type hearings.

      iii) There is no absolute right to confrontation where the right to confrontation would not justify the cost of providing the right 
to confrontation.

      iv) Parrat v taylor- prison officials lost inmates propertty. Prior hearing would be no help, so tort remedy is good enough. 
However, if predetermination hearing is feasible, than parrat rule does not apply.

   c) LUIJAN V GG FIRE SPRINKLERS, SC 2001

      i) Facts- Law required private contractors working with govt to pay state wages to employees. If they didn’t state withheld 
pay without a hearing, but subcontractor can contest in court. GG claims they did comply.

      ii) Hol- california court suit for breach of contract provides adequate DP.

5) **Rulemaking versus adjudication**

   a) Government action that affects identifiable persons on the basis of facts peculiar to them = adjudication. Government action 
directed in a uniform way against a class of persons = rulemaking. **Procedural due process only applies to adjudication, not** 
rulemaking. **Rulemaking does not require procedural due process.**

   b) LONDONDER V DENVER, SC 1908

      i) Facts- City was paving streets. Afterwards it apportioned costs among individual property owners in district. No oral 
hearings were given. One objection was that cost assessment was arbitrary because not all benefit equally from paving.

      ii) Where legislature allows some subordinate body to determine levying tax, DP requires that at some stage of the proceedings 
before the tax is fixed, the TP shall have an opportunity to be heard, of which he must have notice, either personal, by 
publication, or by a law fixing a time for a hearing. Denial of DP here.

   c) BI-METALLIC INVESTMENT CO V STATE BOARD OF EQUALIZATION, SC 1915

      i) State agency tried to increase value of taxable property in colorado 40 percent because it was undervalued. Ps object 
because they were given no opportunity to be heard so their property was taken without DP.
When a rule of conduct will affect more than a few people, it is impracticable that everyone should have a direct voice in its adoption. Const doesn’t require all public acts done in town meeting. Their rights are protected in only way possible in complex society, by their power, immediate or remote, over those who make the rule. Distinguished londoner because of the number of people affected. Seems like londoner is still law though. for example, if you are being treated differently than others, than need DP. But if it applies to a whole class, then DP is different.

The 14th Amendment is satisfied when elected officials make judgments for the people.

d) Notes-
   i) U.S. v. Fla. East Coast Ry. summarizes the modern interpretation of the Londoner-Bi-Metallic distinction: The line is not always bright between proceedings for promulgating policy-type rules or standards and those designed to adjudicate facts in particular cases. However, **where no effort is made to single out any particular entity for special consideration based on its own peculiar circumstances, and factual inferences are used in the formulation of legislative-type judgments for prospective application only, that is rulemaking.** Case involved RR rates regulation.

   ii) Kenneth Davis explains it this way: The crucial difference between the two cases is that L. involves specific facts about particular property, but in B. no such specific facts were disputed. The principle may be that a dispute about facts found on “individual grounds” (adjudicative facts) must be resolved through trial procedure, but a dispute on a question of policy need not be so resolved even if the decision is made in part on the basis of broad and general facts of the kind that contribute to the determination of a question of policy (legislative facts).

e) CUNNINGHAM V DEPT OF CIVIL SERVICE, NJ 1975
   i) Ps had a job. Their dept closed and a new opened. They had a right to that job if it was similar enough. Agency said they don’t get job. They were denied a hearing on comparability. Issue here is wheterh DP entitled them to a hearing.

   ii) It is impracticle to give hearings where a large class is affeted. And if purely legislative, no hearing is requiried. Need for a hearing was to be ascertained by determining whether the administrative agency was acting in a legislative or a quasi judicial capacity.

   iii) **legislative vs. adjudicative fact distinction**—Modifying Bi-Metallic, the court says the crucial questions are whether the fact-finding involves a certain person or persons whose rights will be directly affected, and whether the subject matter at issue is susceptible to the receipt of evidence. If the agency is acting in a general capacity so that the effect of its factual conclusions will be generally applicable, that’s rulemaking and no hearing is required. Where there are contested individual issues, then it’s adjudicative and there is a right to a hearing to contest evidence.

   iv) Hol- hearing must be held. Contested factual issues, Ps need chance to argue their case.

f) Anaconda v ruckelshaus-
   i) EPA made rule regarding emissions of certain gas in a county in MT. Only one person emitting such gas. Claims DP violation since given no hearing. Court says opportunity to appear at a public meeting and give evidence there was enough.

   ii) Hol- no DP violation. Rulemaking authorit, even though only one affected. Anaconda is somewhat accepted. Agency need to form of process to regulate. They cant just change their processes and methods just because only a few people are affected. Agency might not even know only 1 person is effected. So anaconda is an accepted approach. So long as regulation is framed generally and applies to any number of addressees, current or future. But if the regulation only applies to certain companies, than it can be adjudicated.
Chapter 3- administrative adjudication

1) Statutory hearing rights- federal

   a) Statutory rights to an adjudicatory hearing-

      i) FEDERAL APA—Under Federal law, the default rule is for informal adjudication, and agencies are only required to engage in formal adjudication when an external source (such as another statute or the state or federal constitution) requires a hearing. Otherwise, an agency cannot be forced to grant a hearing.

      ii) Federal APA § 554(a) says when the APA applies. If § 554 applies, then §§ 556 and 557 apply as well. §§ 558 and 555 apply to informal adjudication.

      iii) The federal APA does not require formal adjudicative hearings (nor does the 1961 MSAPA, upon which most state APAs are based). However, when another statute or constitution requires a hearing (often by using the magic words “on the record”) these are the rules that are used in formal adjudication under § 554(a):

          (1) “On the record” means on the exclusive record, which means that the trier of fact is not allowed to consider any evidence except that which is admitted at the hearing. Many informal hearings are also held on the record.

          (2) An agency must separate its prosecuting and adjudicating functions (554(d)) and no party can engage in ex parte contact with decisionmakers (557(d))

          (3) An agency must allow such cross-examination at the hearing as “may be required for a full and true disclosure of the facts” (556(d))

          (4) The hearing must be conducted by an ALJ who is hired and assigned to particular cases according to strict standards.

      iv) In the absence of a formal hearing requirement, an agency is free to choose its own dispute resolution procedure—this is called “informal adjudication”.

      b) CITY OF WEST CHICAGO v NRC, 7TH 1983

      iii) Facts- NRC is the nuclear regulatory commission. They regulate and license the nuclear industry. KM runs a thorium milling plant and they were seeking an amendment to their license from NRC. The city challenges the order granting the license amendment. The Atomic Energy Act AEA clearly requires NRC to grant a hearing if requested in any proceeding amending a license. The parties are arguing about the kind of hearing required when issuing an amendment.

      iv) The AEA speaks of a hearing, but doesn’t specify which type. Doesn’t say on the record hearing, but those words aren’t always necessary. But in the absence of those words, the statute must clearly indicate a desire for formal hearings. No such clear intention exists so no formal hearing is required. Hearing is required by statute, but not a formal one.

   g) notes

      i) What about seacoast case decision. Seacoast held that an APA hearing was required by by FWPCA even though it didn’t say on the record. Seacoast held that on the record requirement was for rulemaking decisions, not adjudicative decisions. Seacoast relied on adjudicative nature of decision, finding that rights of party would be affected and resolution of issues required specific factual findings by EPA administrator.

      ii) Seacoast says APA model was intended to regularize administrative hearings by providing a set package of procedural rights. We should give effect to that legislation by assuming that an apa hearing is what congress intended if language says hearing is provided.

      iii) Circuit split: If Congress provides for a hearing but doesn’t specify “on the record”, does it intend formal or informal adjudication? City of West Chicago v. NRC says that means informal. The court said that APA § 554 did not apply because the AEA did not include the words “on the record.” Although “on the record” need not appear for a court to determine that formal hearings are required, in the absence of these words, Congress must clearly indicate its intent to trigger the formal, on-the-record hearing provisions of the APA. On the other hand, the First Cir. in Seacoast said that there is a presumption that when Congress specifies a hearing, that hearing is to be on the record and is to trigger § 554. Seacoast relied on a judicial review clause that required review “on the record”, saying this implied that there had to be a record, I guess.

      iv) When a statute calls for a hearing in rulemaking, the S.Ct. has held that formal procedures need not be used unless the words “on the record” or their equivalent appear in the statute. Fla. East Coast Ry.

      v) APA manual states a statutory provision that rules be issued after a hearing without more, informal hearing is all that is required. That conclusion is based on legislative nature of rulemaking. Same rationale doesn’t apply to adjudication. Where a statute provides for adjudication, ordinarily implies the further requirement of decision in accordance with evidence adduced at the hearing. Manual adopts sea coast theory.

      vi) Chemical Waste took a different tack from West Chicago and Seacoast. The court held that under Chevron, courts should defer to reasonable agency interpretations of ambiguous statutes. Since the hearing requirement was ambiguous, it deferred to the agency’s interpretation.

      vii) We have these presumptions we can adopt one way or another. But we should also look to what the agencies role is and congresses intention. Both sea coast, portland audobon, and cit of west chicago, are all good law. so no clear law here.

      viii) In rulemaking cases, the S.Ct. has made it clear that courts lack power to create extra-statutory procedure except in unusual situations. In Vermont Yankee, the Court declared that courts could not go beyond the rulemaking procedures set forth in the APA. Later, the Court extended this principle to adjudication. As a result, if the procedures for a particular adjudication are not prescribed by the APA or due process or some other source of law, the agency decides what procedure to provide—not the courts. Pension Benefit Guaranty. PBGC casts serious doubt on the correctness of the cases above.

      ix) Note the major difference between rulemaking and adjudication. In the case of informal rulemaking, APA provides a series of adequate protections for the public. In informal adjudication, no protections are provided at all.

      x) Comparative hearings- sometimes, several applicants compete for single license and ones hearing affects the others. In this situation, they must be considered together or else the seconds right to a hearing would be meaningless.
  xi) Wong Yang Sung held that the APA procedures must also apply for constitutionally required hearings, because the Court refused to attribute to Congress the intention to provide less process for constitutional rights. Congress overturned the case with regard to its narrow application, but the logic still remains and could be applied in other contexts. However, the courts seem to ignore or evade this holding.

2) Statutory hearing rights—state
   a) HECKLER V CAMPBELL, SC 1983
      i) Facts- To improve uniformity and efficiency, secretary made medical vocational guidelines. The guidelines relieve the secretary of the need to rely on vocational experts by establishing through rulemaking the types and numbers of jobs that exist in the national economy. They consist of a matrix of 4 factors identified by congress—physical ability, age, education, and work experience. If work exists that claimant could perform then he's not disabled.
      ii) Issue- whether Sec. Of health and human services may rely on published medical vocational guidelines to determine a claimants right to Social security benefits. The SSA directs secretary to make reasonable and proper rules. Act gives sec the power, so the cts review is limited to determining whether the regulations promulgated exceeded eh secretary statutory authority and whether they are arbitrary and capricious. Court holds secretaries reliance on medical vocational guidelines is not inconsistent with SSA.
   b) SUGARLOAF CITIZENS ASSN V NORTHEAST MARYLAND WASTE, MD 1991
      i) Sugarloaf seeks to prevent construction of waste incinerator proposed by NMW. Under clear air act, permits are needed before an incinerator can be built. Issue is whether they must hold a hearing or not, whether it is a contested case or not. The informal proceeding only requires notice, opportunity to present evidence, and a written explanation. 
      ii) Court says this is a contested case within statutory definition. Adjudication required.
   c) METSCH V UNIV OF FLORIDA, FLA, 1989
      i) FL APA requires hearing whenever “substantial interest” at play. Test for sub. interest: (1) injury, (2) injury is of type or nature proceeding designed to protect. This is broader than just property or liberty. Held that admission to U. is not substantial interest—only unilateral expectation. FL does provide only informal proceedings when there is no issue of material fact. The informal proceeding only requires notice, opportunity to present evidence, and a written explanation.
      ii) Issue- whether Sec. Of health and human services may rely on published medical vocational guidelines to determine a claimants right to Social security benefits.
      iii) Secretary must specify the jobs that are available. Court sees that claim as a procedural claim that exists in the national economy. Did not require the words “on the record”—instead looks at the nature of the case.
   d) FCC v WNCN listeners guild, SC 1981- upheld commissions rule that radio stations changes in format would never be considered during license renewal proceedings. Court said that never before held that there must be a waiver provision.

3) Limiting issues of which hearing rights apply
   a) HECKLER V CAMPBELL, SC 1983
      i) Facts- To improve uniformity and efficiency, secretary made medical vocational guidelines. The guidelines relieve the secretary of the need to rely on vocational experts by establishing through rulemaking the types and numbers of jobs that exist in the national economy. They consist of a matrix of 4 factors identified by congress—physical ability, age, education, and work experience. If work exists that claimant could perform then he's not disabled.
      ii) Issue- whether Sec. Of health and human services may rely on published medical vocational guidelines to determine a claimants right to Social security benefits.
      iii) Secretary must specify the jobs that are available. Court sees that claim as a procedural claim that P must be given a right to respond. Court said no right to respond when agency has valid regulations. They are the procedural safeguard. The rulemaking itself provides sufficient procedural protection.
      iv) Even where an agency’s enabling statute expressly requires it to hold a hearing, the agency may rely on its rulemaking authority to determine certain classes of issues that do not require case-by-case consideration, unless Congress clearly expresses an intent to withhold that authority. The party need only be allowed to offer evidence relating to their specific situation and to argue that the rules do not apply to him.
      v) A contrary holding would require continual relitigation of issues that may be established fairly and efficiently in a single rulemaking proceeding. There is desire also for uniformity and a streamlined process. Drawback is you lose the human touch.
   b) Notes-
      i) Secretarys winning streak ended in sullivan v zebley- court struck down a third rule, under which a child deemed eligible for benefits only if he had on of 182 medical conditions listed int eh rule. Court said it would denyu benefits to some children who met statutory standard.
      ii) American Hospital assn v nlrb, SC 1991- court said that even if a statutory scheme requires individualized determinations, the decisionmaker has the authority to rely on rulemaking to resolve certain issues of general applicability unless congress clearly expresses an intent to withhold that authority.
      iv) FCC v WNCN listeners guild, SC 1981- upheld commissions rule that radio stations changes in format would never be considered during license renewal proceedings. Court said that never before held that there must be a waiver provision.

4) Institutional decisions and personal responsibility
   a) Two ways to see administrative decision-making:
(1) Judicial model—sees it like courtroom. Argue that fairness and acceptability to litigants should be goals of the process.

(2) Institutional model—views agency as if it were a single unit with the mission of implementing a regulatory scheme.

Under this view, adjudication is a policymaking technique, along with rulemaking, advice-giving, and publicity. Each adjudication should further agency policy.

(3) The administrative process strikes compromises between these models.

b) MORGAN V US, SC 1936-

i) The one who decides must hear. The officer that makes the determinations must consider and appraise the evidence which justifies them. When a hearing is required, there must be adequate evidence to support necessary findings of fact. If the one who determines the facts has not considered the evidence, no hearing has been given.

ii) Alternatively, the officer may delegate the power to make final decisions to someone else if legally permissible and if the adjudication will not be making new law or policy. Note how both are institutional model.

iii) The hearing is designed to afford the safeguard that the one who decides shall be bound in good conscience to consider the evidence, to be guided by that alone, and to reach his conclusion uninfluenced by extraneous considerations which in other fields might have play in determining purely executive action.

iv) No basis for having one official hear the evidence and another make the final decision. The decisionmaker has a duty akin to that of a judge and it is a personal obligation.

c) Notes-

i) The broadest language of decision cannot be taken literally. Secretary was not required to actually hear the case or even read all the evidence. The last paragraph makes clear that the an examiner may take the evidence and the evidence can be sifted and analyzed by competent subordinates. However, the person making the decision must consider and appraise the evidence which justifies it.

ii) In attempts to look at transcripts to see if there was error, the petitioners must make requisite showing before looking at transcripts. We will not examine the transcripts to determine if we may examine the transcripts.

iii) A DP and APA fundamental ist hat the record made at a hearing is the exclusive basis for decision. The decisionmaker cannot rely on factual information which is not in the record.

iv) Mazza v. Cavicchia—State, not federal case: It violates due process to not be able to see the facts that came out of the hearing, wouldn’t know the issues to rebut—must spell out reason for decision.

v) Morgan IV—There is a rebuttable presumption that deciding officials have complied with legal requirements, including familiarizing themselves with the record. How to rebut? Good question, because it is usually not possible to subject decision-makers (or their staff or law clerks) to discovery or trial about how they made a decision. “Inquiry into mental processes must be avoided absent ’a strong showing of bad faith or improper behavior.” Overton Park. Such cases are a rare exception in order to encourage agencies to engage in uninhibited and frank discussions. As a result, it counsel cannot usually raise a plausible Morgan I contention.

vi) Overton Park was an exception. In that case, the court remanded for an explanation from the Secretary because of substantive, not procedural issues. This exception was very narrow, and probably would not be followed today. Applies only if agency fails to explain. Today, they would just ask for better explanation.

5) Separation of functions

i) Agencies are often criticized because same people serve as legislator, investigator, prosecutor, judge and jury. Nevertheless, the system is largely upheld for efficiency and effectiveness reasons.

b) WALKER V CITY OF BERKELEY, 9TH 1991

iii) Walker held that the same person cannot serve both as decisionmaker and as advocate for the party that benefited from the decision. There is an issue of zealousness in litigation. If the person is litigating the issue, it is hard to believe that the same person could make a fair and unbiased determination on the merits.

iv) DP can permit the same administrative body to investigate and adjudicate. Withrow case. But you cant, as seen here, have the same person investigate and adjudicate. Walker wins, DP violated.

i) Notes

i) § 554(d)(2) codifies this: An employee investigating or prosecuting for an agency may not participate in a factually related case participate or advise in the decision.

ii) 554(d) divides the agency employees into three groups: adversaries (investigators and prosecutors), adjudicators (meaning both the ALJ who hears the case and the agency heads who make the final decision), and everyone else. It prohibits staff members in the first group (adversaries) from serving as adjudicators or from advising the adjudicators off the record. But staff members in the third group (“everyone else”) can furnish off-record advice to the adjudicators. A staff member could be an adversary in one case and serve as an adjudicator or furnish advice to an adjudicator in a different (but similar) case.

iii) 554(d)(1) provides that an ALJ may not consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate. The Court has said: “Nor may a hearing examiner consult any person or party, including other agency officials, concerning a fact at issue in the hearing unless on notice and opportunity for all parties to participate. Thus, 554(d)(1) disables the ALJ (but not other agency decisionmakers, such as intermediate review boards or agency heads) from receiving ex parte advice on factual issues from any agency staff member (whether or not they have been adversaries in the case). But it does not appear to prohibit the ALJ from receiving advice on law or policy from agency staff members. And as far as agency heads are concerned, staff advice on factual matters must relate to evaluation of the evidence in the record, not introduction of new factual material. Introducing new facts would violate the exclusive record principle.

iv) 554(d)(2) provides that an ALJ may not be supervised by a person engaged in performing adversary functions for the agency. Thus ALJs must be part of a separate unit within an agency, supervised only by someone who does not engage in
Bias

a) ANDREWS V AGRICULTURAL LABOR RELATIONS BD, CAL 1981
i) A lawyer’s nature or practice could be taken as his political or social outlook, but is irrelevant to prove bias. The right to an impartial trier of fact is not synonymous with the claimed right to a trier completely indifferent to the general subject matter of the claim before him. The word bias refers to the mental attitude or disposition of the judge toward a party, and not to any views that he may entertain regarding the subject matter involved. If bias includes any preconceptions than no one is unbiased. Therefore, even if the viewpoint of the ALO could be inferred from his practice, that would not be ground for disqualification. **The mere appearance of bias is not a ground for disqualification. Must demonstrate concretely the actual existence of bias.** Effective relief is available by the reviewing court to see if finding is supported by evidence.

ii) Clark dissent - The appearance of bias is a compelling reason for disqualification. Judge must appear unbiased to give litigant DP and maintain public confidence in integrity of system of justice. Majority’s requiring of showing of actual bias is nearly impossible.

c) Types of bias
i) **Prejudgment of the individualized facts of a case:** Mere familiarity with the facts of a case gained by an agency in the performance of its statutory role does not disqualify a decisionmaker.
   1. **Cinderella**—Unguarded public statements look like prejudgment. Agencies get around bias by speaking in vague terms in public.
   2. There is an important difference between prejudgment of individualized facts relating to a private party and prejudgments about law, policy, or legislative facts.
   3. A decisionmaker is not disqualified simply because he has taken a position even in public, on a policy issue related to the dispute, in the absence of a showing that he is not capable of judging a particular controversy fairly on the basis of its own circumstances.

ii) **Animus against a particular litigant** (or a class which includes that litigant).

iii) **Professional bias**—When participation in a profession gives a pecuniary interest in the outcome, such as licensing new optometrists.

iv) **Financial interest/personal stake in the outcome**—Decisionmaker automatically disqualified, whether actually biased or not.
   1. **Tumey**—Since judge received compensation out of fines collected—he was biased.
   2. **Ward**—Due process problem. Agencies budgets get cut—if they find more liability they get more revenue. Doesn’t matter that decision would be reviewed by impartial appellate court, they deserve a fair trial the whole way.
   3. **Cf. Marshall**—If acting in prosecutorial rather than judicial capacity, then the fact that your office keeps part of the fines is okay.

b) Notes
i) An adjudicator can be disqualified if he has a personal interest in the outcome of the decision. Decisionmakers by profession may have a pecuniary interest in the outcome of a case. (Need to consider the rule of necessity in these cases).
ii) Hortonville case—said a school board that conducts negotiations with striking teachers union is not disqualified from discharging teachers who participated in the illegal strike. Mere familiarity with the facts of a case gained by an agency in the performance of its statutory role does not disqualify a decision maker.

iii) Appearance of bias—despite what Andrews court held, appearance of bias standard is often used for the disqualification of federal or state judges.

iv) If a decisionmaker’s statements are biased, that is a violation of DP.
iv) Ex parte communication is defined as an oral or written communication not on the public record to which reasonable prior notice to all parties is not given, but not including requests for status reports on any matter or proceeding.

v) Serves 2 important interests- avoid appearance of impropriety and instrument of fair decisionmaking cause only if they know info before decisionmaker can a party respond correctly.

vi) Relevant considerations- gravity of the communications, whethr the speaking party has benefited from decision, whether contents of communication were known by opposing party, was there an opportunity to resond, would remand serve a useful purpose. Such decision must of necessity be an exercise of equitable discretion.

vii) No remand here because first communications weren't relevant to merits. Second ones had no effect because that party lost.

viii) 557d applies only to formal adjudicate decision, not informal. Only when its on the record.

b) Notes-
   i) First savings and loan assn v vandygriff, tex, 1981- concerned a contact between an applicant for a SL charter and texas commissioner. Commissioner turned down application in august. They met in september, filed a new application in october and were accepted. Court held that was ok because there was no contested case at time communications were made. Also no prejudice because it was fully disclosed at second hearing.

ii) Portland audobon society v endangered species comm- 9th 1993- The white house made communications to the committee. The president is an interested person and is highly influential. The endangered species act explicitly vests discretion to make exemption decisions int eh committee and not with white house. So it was illegal ex parte communications.

   iii) Sierra club v costle- upheld right of president to engage in ex parte communications in rulemaking.

8) The role of political oversight

   a) PILLSBURY CO V FTC, 5TH 1966
      i) Issue is whether pillsbuy was deprived of due process by reason of improper interference by congressional committess witht eh decision process of the FTC whielt eh case was pending before it.

      ii) Pillsbury— Congress may investigate the agency as to broad legislative matters and call them to task for failing to adhere to the intent of Congress in supplying meaning to the often broad statutory standards from which the agencies derive their authority. However, when such an investigation focuses directly and substantially upon the mental decisional processes of a Commission in a case which is pending before it, Congress is no longer intervening in the agency’s legislative function, but rather, in its judicial function. At this latter point, we become concerned with the right of private litigants to a fair trial and, equally important, with their right to the appearance of impartiality, which cannot be maintained unless those who exercise the judicial function are free from powerful external influences.

      iii) The legislature can have hearings and clarify the authority of an agency. But cannot focus directly on the mental decisional processes of a comission in a case which is pending before it, congress is no longer intervening in agencies legislative function, but rather in its judicial function. Private litigants have a right to a fair trial, free from eh appearance of impartiality and external influences.

   iv) Congresses acts hear sacrificed the appearance of impartiality. They questioned and criticized decision makers in matter still before them. cant just expect officials to ignore congress. Must preserve integrity of process.

   v) Keating 5 case- proceeding was on horizon, but no actual proceedings begun. So no ex parte contacts in violation of law. in informal settings the rules are more lenient. But in formal proceedings, the rules are pretty strict.

   b) Notes-
      i) DC fed of civi assns v volpe- congress put pressure on agency to approve new bridge. Threatened to take away funding. Said it was ok because it didn’t deal with a quasi judicial proceeding. Decision wasn’t based on the formal record. Pillsbury decision only applies to formal adjudications. However, even in informal adjudication, there are limits on legislative interference. Agency decisions are supposed to be based on fact and advice, not wishes of congressmen. So must look at see why they made decision. If based on engineering than its ok, if based on wishes of congressmen not ok.

      ii) DPC farms v yeutter- congressmen wrote letter saying that DPC had violated intent and goals of statute so the USDA should reach the right decision or theyd have to amend the statute. The USDA followed the orders and activily pursued DPC. DPC sued and lost because the matter was not yet a judicial proceeding. Erecting a barrier to such communications would infringe too far on congressional oversight of administrative agencies.

      iii) Is this unjustified meddling- maybe or maybe not. No trial yet so not judicial proceeding interfering with. And also they are clarifying the intent of the law that they made. Court draws line at the time a hearing takes place. Where does the APA draw the line. When there is notice that a proceeding will be had is where the APA draws the line. Here, congress knew a hearing would be coming, so they had notice and in a sense, this was in violation of the APA. The fuzzy word is “knows”. Does the congressmen know.
Chapter 4- the process of administrative adjudication

1) Investigations and discovery
   a) Agencies need a statutory basis other than the APA to compel production. § 555 (c) and (d).
   b) By and large, the rules are not as strict as the criminal system—there is a pretty broad ability to search.

b) CRAIB V BULMASH, CAL, 1989
   i) Subpoenaed Craib to produce records and info. Required to have this info by statute. Bulmahs failed to appear so craib filed
      a petition in court seeking enforcement f subpoena.
   ii) 4th amend- Regulatory schemes have become increasingly important in enforcing laws designed to protect the public’s
       health and welfare, reliance on probable cause as a means of restraining agency subpoena power has all but disappeared.
   iii) Rule- the investigation needs only be for a lawfully authorized purpose within power of legislature to commasn.

          Requirement of probable cause is satisfied as long as the subpoenaed documents are relevant to the inquiry. The requirement
          of reasonableness, including particularity in describing the place to be searched, and the persons or things to be seized, for
          the purposes of the relevant inquiry.

   iv) The test is one of reasonableness. Its reasonable here because no invasion entry. Commis is entitled to investigate the type
       of alleged wage-order violations at issue here and that such investigations are within the power of the legislature to comman.
       It does not impose an unreasonable burden on employers. They must keep these records anyway.
   v) 5th amend- info here was part of an appropriate regulatory scheme. Not aimed at punishing but at ensuring employees are
       not working under unlawful conditions, and it protects employers who comply with the law from those who attempt to cheat
       at expense of workers.

   iv) Notes-
   i) Oklahoma Press says such searches are almost always “reasonable”. The analogy is to a grand jury subpoena, not a search
      warrant.
   ii) Defenses to subpoena: agency has no jurisdiction over the matter, procedural rule violation, or subpoena too vague and
       indefinite or unreasonably broad and burdensome. However, all are difficult to sustain. Additionally, court may refuse to
       enforce a subpoena when the agency is acting in bad faith or is trying to pressure or harass the demandee.
   iii) ICC v. Brimson—Agency cannot enforce its own subpoenas, must go to court.
   iv) lavin case- attorney client privilege and work product privilege apply to agency investigations.
   v) In a criminal case, D can refuse to take stand. Cannot do so in admin hearing. So often, Ds will want to defer admin
       hearings until after criminal proceedings if they have both. Sometimes they can, but court has the discretion. No right to
       delay. Keating case- balances interests of the agency, the public, and the courts. Refused to grant the stay.
   vi) Privilege doesn’t apply to evidence seized under a valid search warrant. Privilege is inapplicable to records that statute
       requires be prepared and maintained- shapiro case
   vii) Barlow- to physically inspect a home or business, a search warrant is needed. For admin search warrant thoug, don’t need
       probable cause. Just based on reasonable and neutral standards, such as statistical sampling. Although the warrant
       requirement is easy to satisfy, at least tends to prevent an inspection that is motivated by harassment or other improper
       purposes.
   viii) Barlows rule doesn’t apply to places with lessened privacy expecataions, like gun shops and licquor stores. Burger case
        made 4 criteria that must be met to justify warrantlyess administrative inspections- 1) substantial govt interest in regluating
        business 2) unannounced inspections must be necessary to further regulatory scheme 3) statute must advise the owner of the
        periodic inspection program 4) searches must be limited in time place and scope.
   ix) Publicitiy- agencies frequently issue press releases about a pending investigation, complaint on decision. Adverse pbulicity
       imposes public deprivation without DP of law. but usually no protection other than the common sense and good will of the
       administrator prevents unreaosnable use of coercive ability.

   x) Cinderella school cxase- held that FTC could issue press releases because consumers are entitled to know who they are
       dealing with. Concurring opinion said must balance the damage to private industry against protection of tehpublic.

2) Evidence at the hearing
   a) REGEURO V TEACHER STANDARDS AND PRACTICES COMMISSION, OR, 1991
   i) Facts- teacher fired because of sexual assault allegations. two girls made allegations that were presented by testimony of
       others. But they never testified. It was suspect evidence and P presented his own evidence.
   ii) Majority rule: Residuum rule: Requires that an administrative agency’s findings be supported by some evidence that would
       be admissible in a civil or criminal trial. Criticism of residuum rule: don’t have to worry as much about inadmissible
       evidence because no juries.
   iii) Minority rule: Substantial evidence test: Case-specific inquiry. Hearsay may be admitted just like any other evidence.
       However, the finding of the court must be based on substantial evidence based on the whole record. Factors to consider:
       alternative to relying on the hearsay, importance of the facts sought to be proved to the outcome, state of opposing evidence,
       consequences of decision either way, etc. This means that hearsay may be sufficient, but it may not be.
   iv) In this case, court rejects residuum rule and applies substantial evidence test. holds that decision wasn’t based on sub evi.
   v) Notes
   i) The federal courts do not follow the residuum rule. They use the substantial evidence rule, and the S. Ct. has said that
      hearsay can be enough. Richardson v. Perales.
   ii) What do the rules say- 412 says evidence not excluded just becaue its hearsay. 556d says any evidence may be received, but
      agency should exclude unreliable evidence. so rules allow evidence in and don’t follow residuum rule.
iii) Substantial evidence exists to support a finding of fact when the record, viewed as a whole, would permit a reasonable person to make that finding. The substantial evidence test requires a court to be quite deferential toward an agency’s findings of fact, but still permits the court to overturn such findings if it feels an injustice has been done.

iv) Olabanji v ins- ordered P deported because of sham marriage. Relying on an affidavit. Court held that it violated DP since the INS could have just subpoenaed the wife to testify but didn’t. INS could only rely on affidavit if it showed that despite reasonable efforts, it could not have secured the wife’s presence.

v) Greenwich Collieries case- agency rule that allows applicant to receive benefits if the evidence on both sides is equal violates 556d.

vi) Administrative judges are expected to take an active role in developing the record. Very important if one party isn’t represented by counsel. In some cases, judge may be committing reversible error by failing to help the unrepresented party establish his case.

3) Official notice

i) A court is permitted to take judicial notice- treat as proven- various facts and propositions which are very likely to be true. It’s a time saver. A court takes judicial notice of matters of such common knowledge that they cannot be reasonably subject of dispute and are easily determined with indisputable accuracy. Agencies are able to take official notice of matters which could be subject of judicial notice, and they can go even further with that than a court could.

b) FRANZ V BD OF MEDICAL QUALITY ASSURANCE, CAL 1982

i) Bd said doctors actions were gross negligence but no expert testimony was offered. So Franz says no evidence of extreme departure from ordinary standard of conduct.

ii) The agency must provide as complete a basis for judicial review as due diligence makes feasible. It must include any technical matter necessary to enable a lay judge to determine whether the agency’s decision has adequate support. This is not an unreasonable burden. 556e deals with official notice.

iii) We think an agency factfinder may reject uncontradicted opinion testimony that his own expertise renders unpersuasive.

iv) Yet DP requires, when in an adjudication an agency intends to rely on members expertise to resolve legislative fact issues, that it notify the parties and provide an opportunity for rebuttal. The agencies notification must be complete and specific enough to give an effective opp for rebuttal. It must also help build a record adequate for judicial review. If it meets those requirements there is no prejudice.

v) Basis of opinion was that P didn’t have chance to rebut the evidence against him. Secondary part was lack of info for appeal. Frustrates effective judicial review.

c) Notes-

i) Castillo-villagra v ins case- denied refugee status and deported P. Judge took official notice of certain facts regarding political state in home country. Court held that some facts were both legislative and nondisputable. One fact was legislative but disputable. Final fact was adjudicative and disputable. Court held that agency should have warned P that it took official notice and given him opp to respond.

ii) Most cases hold that the opportunity to rebut officially noticed facts can occur in the form of a motion to reopen the proceedings for further evidence.

iii) Market st ry co case- prediction aht lowering fares would increase number of passengers carried- no requirement that RR have opportunity to rebut this conclusion because it’s a legislative fact and not adjudicative.

iv) When an agency relies on background knowledge and experience to evaluate evidence, it is not taking official notice of anything and need not specially notify the parties and afford opportunity to contest the evaluation. However, the distinction between taking officila notice and evaluating evidence is often difficult to draw.

v) Ambuch case- panel was relying on evidence outside record. Court said could not use own expertise to sub for evidence.

vi) Summary: The doctrine of official notice is used to relax the burden on agencies and allow them to draw on expertise in some ways, but they still have to point to something to validate expertise even if outside record.

4) Findings and reasons

a) IN THE MATTER OF CIBA-GEIGY CORP, NJ, 1990

i) Agency must provide reasons for its decision—forces agency to think. What did agency say- nothing except what they granted the permit. Issue is whether they need to explain the decision. Since they didn’t explain it, the decision cannot stand. Unclear if it complied with statute.

ii) Purpose: 1) notice to all interested parties, 2) ensure that agencies act w/in scope of delegated authority, 3) facilitates appellate review, 4) no post hoc rationalizations—don’t want to substitute reasons of lawyer for that of agency (delegation of authority, sp of powers argument).

b) Notes

i) So what happens- does agency have to rehear case or just make up reasons.

1) Chenery—If an agency has failed to make findings or to state reasons, the deficiency cannot be repaired by post-hoc rationalizations. Create temptation for agency not to do its job at the time if you allow post hoc rationalizations.

2) Exception: Cf. Bagdanas—affidavit could be considered as an explanation of the agency’s decision which the court then upheld but it was to be “viewed critically.”

3) Vermont Yankee- held a court could not impose rule making porcureas requirements beyond those specified in statute, in order to improve decisionmaking and judicial review. LTV- did same thing for adjudication procedures.

ii) Adams v bd of rev- Administrative bodes may not rely upon findings that contain only ultimate conclusions. Must give parties indication of bases for decision and give reviewing court something to review.

iii) Dunlop case- Sec refused to bring suit and didn’t say why. Court said he must state reasons for his refusal.
5) Equitable estoppel
   a) FOOTE’S DIXIE DANDY INC V MCHENRY, ARK 1980
      i) Case regarded owner who incorporated 2 stores and asked about taxes and relied on them.
      ii) Estoppel is not available in federal courts (never or almost never?)— i.e. the government is not bound by equitable estoppel and apparent authority when the action of its agent misleads a person to his detriment.
      iii) To get estoppel in some state courts, must prove four things: 1) The party to be estopped must know the facts, 2) He must intend that his conduct shall be acted on or must so act that the party asserting the estoppel had a right to believe it is so intended, 3) The latter must be ignorant of the true facts, 4) He must rely on the former’s conduct to his injury.
      iv) Agencies must be accountable for their mistakes. Detrimental reliance on their misrepresentations or mere unconscientiousness should create an estoppel, at least in cases where no serious damage to national policy would result.
      v) Govt position- the law is the law and cant change the law because of some bad info. Also don’t want effective tax law defined by low level clerks. If govt is bound by them we wont want them giving any advice. If they allow individuals to rely on agencies advice in violation of regulations, then also have to worry about people who don’t agree with policy of agency telling people bad advice.

   b) Notes
      i) Estoppel claims against govt could have bad effects- govts cant control thousands of employees. Invite endless litigation. Might cause agencies to give less advice. Inevitable fact of occasional hardship cannot undermine the interest of nation in ready availability of govt info.
      ii) Heckler case- SC rejected claims for estoppel. Estoppel requires reasonable reliance. Wasn’t reasonable here because it was oral. Should have got better advice.
      iii) GE v epa- agency must give fair notice to a regulated party of what conduct it prohibits or requires before in can invoke sanctions against the party. Matter of DP.
      iv) Chrysler case- ordered to recall cars for deficient seatbelts. Court said didn’t have to recall because not informed of proper safety tests before hand. Must give fair warning.
Chapter 5- rulemaking procedures

1) Importance of rulemaking
   a) **Advantages of rulemaking:** Participation by all affected parties, appropriate procedure, generally apply only prospectively, providing warnings to regulated parties, uniformity, political input, agency agenda setting, agency efficiency, easier for regulated parties to find and understand than case law, makes legislative and executive oversight easier.
   b) **Disadvantages to rulemaking:** Less flexible, policy must be made in the abstract, creating cruder, less sensitive law, not good for new and unexpected problems, there will still have to be adjudication involving the rules.
   c) Courts generally accept that an agency has a right to make rules unless there is something in the statute which gives clear evidence that the legislature did not intend for the agency to have rulemaking power.

2) Definition of rule
   i) See Rule 551(4)
   ii) **Acus, a guide to federal agency rulemaking:** APAs distinction between rulemaking and adjudication- rulemaking is agency action which regulates the future conduct of either groups of persons or single person; it is essentially legislative in nature, not only because it operates int eh future but also because it is primarily concerned with policy considerations. Typically the issues relate not to the evidentiary facts, as to which the veracity and demeanor of witnesses would often be important, ut rahther to the policy making conclusion to be drawn from the facts. Courts have upheld classification of agency action as a rule even if it applies to a single entity.
   iii) **How to tell rules and adjudications apart:** A rule is always prospective, but an order canbe retroactive. A rule usually requires a further proceeding to make it concretely effective against a particular individual, while an order needs no further proceeding. A rule is directed at a class that is open while an order binds only parties to adjudication. Rule is based on predicions of future and order on past. In close cases a court might determine whether a particular proceeding is rule making or adjudication by asking whether rulemaking or adjudication procedures are most appropriate for its efficient, effective, and fair operation.
   iv) Some scholars criticize distinction between rulemaking and adjud as too rigid. Some believe various procedures could be in place that apply based on what agency is doing, and not on classification. So it depends whether they are making nonspecific guidelines, or making trial procedure.
   v) **Nonlegilsaitve rules,** often called interpretive rules or statements of policy, are agency rules that do not have the force of law because they are not based upon any delegated authority to issue such rules. Don’t require notice and comment.
   vi) **Industrial safety equip v epa case:** court held that a guide published was not a rule and therefore was not subject to judicial review. The guide was simply an educational publication that did not implement interpret or prescrive law or policy within the meaning of the APA.

b) Rules normally estbalsih law or policy for the future, while orders generally concern past events and have retroactive effect. The federal APA and many states explicitly define rules as having future effect.

c) **BOWEN V GEORGETOWN UNIVERSITY HOSPITAL, SC 1988**
   i) Case had to do with reimbursement for medicare expenses. tried to make retroactive rule.
   ii) Courts will not allow administrative agencies to pass retroactive regulations unless it is clear in the enabling statute that Congress intended for the agency to have power to pass retroactive regulations and the regulation clearly states that it is to be applied retroactively. We don’t want retroactive rules for policy reasons. Scalia’s concurrence says there is a difference between true retroactivity and secondary retroactivity. New rules can make you worse off because of the effect of past decisions and will not be invalid because of the effect of past decisions and will not be invalid because of retroactivity.
   iii) Retroactivity is not favor int eh law. thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result. Similarly, congress must expressly give agency power to make retroactive laws, otherwise power doesn’t exist.

d) Notes
   i) In the past, courts have freely given retroactive effect to interpretative rules, in which an agency states what it thinks existing law means but does not purport to change the law.
   ii) 2 presumptions of statutroy interpretation- first- presumption that statutes and rules do not apply retroactivly. Fairness dictates that individuals should have an opportunity to know what ht law is and to conform their conduct accordingly. Second- agency may not issue retroactive legisilative rules unless congress expressly authorizes retroactivity.

3) Initiation of rulemaking
   i) § 553(b) says notice or a proposed rule must be published in Fed Register
   ii) § 553(c) says after notice, agency shall solicit comment

b) **CHOCOLATE MANUFACTURERS ASSN V BLOCK, 4th, 1985**
   i) Rule- The notice must be sufficiently descriptive to provide interested parties with a fair opportunity to comment and to participate in the rulemaking. Notice is adequate if the changes in the original plan are in character with the original scheme and the final rule is a logical outgrowth of the notice and comments already given.
   ii) Hol- There was insufficient notice that the deletion of flavored milk from the program would be considered if adverse comments were received, and therefore, affected parties did not receive a fair opportunity to contribute to admin rulemaking process. They must have a chance to respond.
   iii) The policy purpose is “to allow the agency to benefit from the experience and input of the parties who file comments and to see to it that the agency maintains a flexible and open-minded attitude towards its own rules.”
iv) Language of 553c says shall give people opportuniy to participate in rulemaking. Can only participate in meaningful manner if they have the factual basis for proposed rule. There must be some disclosure. Can’t have effective critique unless you know what other parties case is. That’s why we allow cross examination in trials.

c) Notes
i) Administrative Conference suggested that the APA should provide for a minimum comment period of not fewer than 30 days, subject to the agency’s right, which exists under current law, to shorten or eliminate the comment period if it could establish good cause.

ii) United steelworkers of America v schuylkill metals case- OSHA proposed a rule under which employers would be required to transfer workers whose health was at risk because of exposure to lead. OSHA asked for comments about whether workers should get benefits that would maintain rate of pay and other rights. The rule did not propose and specific benefit. Ultimately, OSHA adopted a rule that required employers to maintain the earnings of transferred workers for 18 months even if employee actually worked fewer hours or was laid off. Rejecting a 553b challenge, court concluded that the notice more than adequately sufficed to apprise fairly an interested party that there was an issue regarding the breadth of benefits.

iii) Brocal corp case- among differences between proposed rules and the final rules were, uniform industry-wide limits on reimbursement replaced a system in which limits would be set individually for each carrier. Court held that the agency was no required to solicit comments before making these changes. Said that a final rule may contain such modifications to the proposed text as do not enlarge its original purpose. Purpose refers to the reason for enacting legislation, not the particular course or scheme chosen to achieve that end. Here, the method for calculating reimbursment limits was not changed, not the reason for creating limits.

iv) Portland cement ass v ruckleshaus- Basically, must give info in tiemly fashion so people have a chance to respond. The notice of rulemaking is required to include scientific data or methodology upon which the agency relied in formulating its proposal.

v) Conn light and power co case- purpose of notice period is to allow public to communicate info and concerns. to do so usefully, must give meaningful info available and basis for proposed rule.

vi) American mining congress case- nine documents not exposed to comment became part of the record after close of comment period. This was held ok because nothing to indicate that secretaty relied on these documents in making its rule. Difference between notice of proposed rulemaking and the rulemaking record. It is the former to which the statutory right of comment applies, not the latter.

vii) What if new material is added to record after close of comment period so public couldn’t comment on them- in Rybachek court held public did not have right to comment on them- either the comment period would continue in never ending circle, or if the EPA chose not to respond to last set of public comnets, any final rule could be struck down for lack of support in teh record.

viii) Idaho farm bureau case- distinguished rybachek. The report here was more than a response to comments and did not merely supplement or confirm existing data.

ix) Air Transport Ass’n v. CAB—In order for a challenge to information added after the comment period to be sustained, the challenger must indicate with reasonable specificity which portions of the documents it objects to and how it might have responded if given the opportunity. However, in Shell Oil Co. v. EPA, the court said that in a logical outgrowth case, the person challenging the rule does not have the burden to show the comments that he would have made; instead, the agency has the burden of showing that comments on the changes it made between the proposed and final rules would have been useless.

4) Public participation
a) Formal rulemaking involves an opportunity for a trial type hearing, including the right to present evidence, conduct cross examination, and submit rebuttal evidence, according to most of the adjudication provisions of the federal act. Spelled out in 556 and 557. These provisions only come into play when rules are required by statute to be made on the record after opportunity for an agency hearing.

b) Informal rulemaking- often called notice and comment rulemaking, is governed by less rigorous procedural requirements. Process usually revolves around an exchange of documents, a so called paper hearing. Informal rulemaking is the norm, formal the exception.

c) State APAs, in contrast explicitly recognize only informal rulemaking.

5) Public participation- informal rulemaking
a) Under Federal APA, the agency is free to limit public participation to written submissions unless the agency determines otherwise or some other species of law requires more.

b) Under 553(b) — Notice must be published in the Federal Register

c) Under 553(c) — Requires agency to allow written submissions

d) 553(c) — Also requires that the agency incorporate in the rules adopted a concise general statement of their basis and purpose.

e) Agency rulemaking procedures are designed to ensure that rules coincide with will of people. Another is to ensure full infor for decision makers. Can only be achieved if people have reasonable opportunity to communicate. But it does take a lot of resources to monitor acts of agencies and give them evidence. Creates an inability for poor people to participate. Another problem is that agency people are often middle class and don’t know what’s best for poor. So they have no voice or say in rules.

6) Public participation- formal rulemaking
i) §556 & 557 come into play when § 553(c) requires the agency to conduct formal rulemaking “when rules are required by statute to be made on the record after opportunity for an agency hearing.” APA §§ 556, 557 contain the required procedures for rulemaking:
Set forth in 556 and 557. Ex parte comm are prohibited, 557d but separation of functions rule doesn’t apply, 554d.

Issues at stake in rulemaking are policy-making issues or scientific issues that are not well-explored through a courtroom adversarial approach

§§ 556, 557 require trial-type hearings, including the right to present evidence, cross-examine witnesses, and submit rebuttal evidence.

b) US V FLORIDA EAST COAST RAILWAY CO, SC 1973

i) A statute that the ICC “after hearing” can establish rules with respect to car service does not require that the agency give the procedures required under 556 and 557 because “after hearing” is not the same thing as “on the record after opportunity for an agency hearing.” Congress can provide for more procedures than those provided in § 553, but still less than §§ 556 and 557.

ii) Florida East Coast shows a presumption against formal rulemaking

a) The parties had fair notice of exactly what the commission proposed to do, and were given an opportunity to comment, object, or make some other form of written submission. Thus, hearing requirement of statute was met.

b) Hybrid rulemaking—Statutory schemes that resemble the basic notice and comment process, but include additional/alternate procedural requirements that are designed to broaden opportunities for public participation

b) VERMONT YANKEE NUCLEAR POWER CORP V NATURAL RESOURCES DEFENSE COUNCIL, SC 1978

i) agency refused to allow cross exam of Dr. Pittman who wrote report that agency relied on in granting nuclear permit. They are arguing procedure should have required the opportunity to cross examine him before it was relied on to make final rule.

ii) The APA established the maximum procedural requirements congress was willing to have the courts impose on agencies. Agencies have discretion to grant more procedural opp, but reviewing courts cannot impose them upon agencies. This is not to say necessarily that there are no circumstances which would ever justify a court overturning agency action because of a failure to employ procedures beyond those required by the statute. But such circumstances are extremely rare.

iii) Absent const constraints or compelling circumstances, agencies should be free to pursue own mehtods so long as they meet 553. Congress intended that the discretion of the agencies and not that of the court be exercised in determining when extra procedural devies should be employed. Like court is saying, as long as DP is satisfied, and statutory requirments are satisfied, that is all courts can require. Not their place. Is this best result, maybe not, but its congresses job to reach best result, not courts.

iv) On remand the rule was struck down on theory that it was arbitrary. Courts can look at substance, but can’t require proc.

c) Yankee- overton park tension

i) Yankee Case – courts can’t impose on agencies mere specific procedural requirements that have no basis in the APA

ii) Overton Park – suggests that APA 706(2)(a) which directs courts to ensure action isn’t arbitrary and capricious imposes a general procedural requirement b/c mandates agency to take steps needed to provide explanation that renders their decisions and rationale reviewable.

iii) Compromise—Yankee gives agency a lot of leeway to decide how to best establish the record – but have to show some method to make the record to prove that the decision was legitimately founded. Overton park just ensures the decisions are not arbitrary and there is basis for them.

d) Notes-

i) National lime case- court described its standard of review for EPA rulemaking as evincing- a concern that variable sbe accounted for, that test conditions be ascertained, validity of tests assured, assumption revealed, rejection of alternate theories explained, rationale for ultimate decision set forth in a way that permits public to exercise its statutory prerogative of comment and the courts to exercise their statutroy responsibility upon review.

ii) Vermont yankee was about informal rulemaking. Can same reasoning be applied to informal adjudication. PBGC v LTV case said yes. As long as you meet minimum requirement sof 555, and DP is satisfied, that’s good enough.

7) Public participation- hybrid rulemaking

i) Hybrid rulemaking—Statutory schemes that resemble the basic notice and comment process, but include additional/alternate procedural requirements that are designed to broaden opportunities for public participation

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iii) Compromise—Yankee gives agency a lot of leeway to decide how to best establish the record – but have to show some method to make the record to prove that the decision was legitimately founded. Overton park just ensures the decisions are not arbitrary and there is basis for them.

d) Notes-

i) National lime case- court described its standard of review for EPA rulemaking as evincing- a concern that variable sbe accounted for, that test conditions be ascertained, validity of tests assured, assumption revealed, rejection of alternate theories explained, rationale for ultimate decision set forth in a way that permits public to exercise its statutory prerogative of comment and the courts to exercise their statutroy responsibility upon review.

ii) Vermont yankee was about informal rulemaking. Can same reasoning be applied to informal adjudication. PBGC v LTV case said yes. As long as you meet minimum requirement sof 555, and DP is satisfied, that’s good enough.

8) Procedural fairness in rulemaking- role of agency heads

a) Morgan I said that a person who takes responsibility for an agency decision must at least have some personal familiarity with the record. Should same principle apply to informal rulemaking. But, Persons who wish to challenge a rule are usually not free to examine an agency head in court to ascertain whether he or she understood the record assembled during the rulemaking proceeding. (Morgan IV)
Procedural fairness in rulemaking- ex parte contacts

i) The record serves 3 basic functions. It aids public participation, it provides materials helpful to the agency in making a decision, and it facilitates judicial review of the agency decision. The APA is silent in regards to creation of an official agency record in rulemaking. 81 MSAPA specifies materials for record.

ii) In formal rulemaking, ex parte communications are clearly forbidden and if they occur they must be disclosed. 557d. but in informal rulemaking, the assumption for many years was that the APA neither banned ex parte communications nor required the inclusion of such communications in the agency rulemaking record.

b) HBO V FCC, DC 1977

i) Not followed—HBO v. FCC —This case invalidated a rule of the FCC because part of the basis of the agency’s decision was ex parte communications, and the FCC did not put this information in the record. There have been no cases following HBO since it was decided. Sierra Club is the standard now.

ii) Here agency solicited ex parte contacts. Agency cannot have two separate records, the public one and the private one that is relied on for decision. Secrecy is inconsistent with fundamental fairness implicit in DP and with the ideal of reasoned decisionmaking onto which merits.

iii) Ex parte communications are appropriate so long as they don’t frustrate judicial review or raise serious questions of fairness.

iv) Communications which are received prior to issuance of a formal notice of rulemaking do not, in general, have to be put in a public file. Of course, if the information contained in such a communication forms the basis for agency action, then that information must be disclosed to the public in some form.

v) If ex parte contacts nonetheless occur, we think any written document or a summary of any oral communication must be placed in the public file so that interested parties may comment.

c) SIERRA CLUB V COSTLE, DC 1981- took over HBO and is now the law

i) Issue here was whether the rule was invalid because of an ex parte blitz that began after the close of the comment period. The blitz included meetings between eh agency and private persons, executive branch officials, and elected officials. According to the EDF, the agency had been on the verge of adopting stricter limits on sulfur dioxide emissions, but it backed down because of these meetings, in which eh white house tried to influence EPA to adopt a less costly solution.

ii) Where agency action involves informal rulemaking of a policymaking sort, the concept of prohibiting ex parte contacts is of more questionable utility. However, since the statute provides that the promulgated rule may not be based (in part or whole) on information or data which has not been placed in the docket, the EPA must justify its rulemaking solely on the basis of the record it compiles and makes public. That Congress did not extend the ex parte contact provisions of the amended section 557 to section 553 — even though such an extension was urged upon it during the hearing — is a sound indication that Congress still does not favor a per se prohibition or even a “logging” requirement in all such proceedings.

iii) Don’t need the ex parte contacts ban b/c the agency will have to defend its rule against an open record anyway

iv) Agency has an incentive to make sure that everything gets into the record, at least enough to sustain the rule

v) DC federation case required 2 grounds before rulemaking may be overturned because of congressional pressure. First, content of pressure is designed to make agency decide on matters not made relevant by congress statute. Second, secretaries determination must be affected by those extraneous considerations. No persuasive evidence that either criterion is satisfied here. it is entirely proper for congressional representatives to represent the interests of constituents before admin agencies engaged in informal general policy rulemaking, so long as they don’t frustrate statutorily intent of congress nor undermine applicable rules of procedure.

d) Notes-

i) Sierra club did indicate that ex parte contacts may be restricted where agency action involves quasi adjudication among conflicting private claims to a valuable privilege. – Sangamon Valley case. That case was a rulemaking proceeding, but in the shortrun only affected two parties. One TV station did extensive ex parte lobbying and got the result they wanted. Court invalidated the decision because basic fairness requires such a proceeding be carried on in the open.

ii) ACUS recommendation- agencies should be free to receive written or oral policy advice at any time form the president, advisers of the pres, or other administrative bodies, without any duty of disclosure, except to extent these communications contain material factual info pertaining to the proposed rule. But many dissented from this rule thinking they should have to disclose.

Procedural fairness in rulemaking- prejudgment

a) ASSOCIATION OF NATIONAL ADVERTISERS V FTC, DC 1979

i) FTC tried to shield kids from seeing ads from commercials for products including sugary cereals, chairman made public statements re issue. Need a clear and convincing showing that the rulemaker has an unalterably closed mind on matters critical to the disposition of the rulemaking. It is very hard to disqualify someone in a rulemaking context; much harder than in an adjudicative hearing. Policymakers have to have opinions. He has indicated that he would favor a rule, but has not indicated that he will not consider different forms of the rule or what the rule should contain.

ii) Rulemaking different from adjudication: more of a political process—need political commitment more than impartiality.
Regulatory analysis

a) A commissioner of an agency is expected to often make speeches and express opinions of the agency. That’s his job. He is expected to lead public opinion. He is a leader. Can’t be a leader without advocating something.

b) Mahoney v shinpoch, wash, 1987

i) a hearing on proposed rule was scheduled for nov 26. On the 7th, the SSA wrote a letter to DSHS advising them that the state is opting to revise the SS per the amendments. The court concluded that the letter demonstrated that the agency had already made its decision before it had considered public comment and that the rule violated the state APA. Full compliance of public comment prior to action is both statutory and const imperative. No harmless error provision. Its per se invalid.

ii) I think this case was rightly decided. But should we apply a harmless error rule. Why should they have to wait if their mind if made up. This is clear and convincing that their mind was made up.

11) Statement of basis and purpose

i) Functions of an effective statement of basis-

(1) Satisfy legislative mandate; Facilitates meaningful judicial review; Submits agency to more informed scrutiny.; By making them articulate reasons, it is more likely to be reasonable rather than arbitrary and capricious.; Introduce element of predictability; Stimulates public confidence in agency action by giving appearance of rationality.

b) CALI HOTEL & MOTEL ASSN V INDUSTRIAL WELFARE COMMN, CAL, 1979

i) A central function is to facilitate judicial review of agency action. Must ask 3 questions- 1) did agency act within their scope of authority 2) did agency employ fair procedures 3) was the agency action reasonable. Under third factor, court will uphold the action unless it's arbitrary or lacking evidentiary support. A court must ensure that a agency adequately considered all relevant factors and demonstrated a ratioanl connection between those factors.

ii) The statement of basis must show that the order adopted is reasonabnly supported by the material gathered by or presented to the commission. Must also be reasonably related to enabling statute. Here it fails for all three goals listed above.

iii) Commission arguest hat even though statement for order may not be enough, it is supported by the statement of findings. Court disagrees. The statement of findings was not published. It does not address salient comments presented. The commission never explained why it exempted other industries, but not he public housekeeping industry.

c) Notes-

i) We want people to know they were listened to. Want to ensure that the agency has some decent answer for its rule. But has modern judicial review of agencies forced agencies to write opinions that are too cumbersome. But judicial doctrine says there is no need to respond except to significant comments. Agency doesn’t have to respond to thousands of comments. Just the matieral ones. But its often hard to determine which comments are significant until court reviews it.

ii) Agency cannot always anticipate what issues a court will consider important. Agency has to address every point that a court might think is important—otherwise, there is too much risk of reversal=slows down process.

iii) Automotive parts assn v boyd case- agency doesn’t have to address every item or comment received. But must give meaningful concise general statement of basis and purpose mandated by 553. Only major issues of policy have to be addressed.

iv) Rodway v USDA case- basis and purpose statement is not intneded to be an abstract explanation of imaginary complaints. Purpose is to address comments receieved and how it made its decision and reached ultimate rule. Intertwined with the comments. But don’t have to respond to every comment, just the significant and matieral ones- american mining cong case.

v) Post hoc rationalizations- aside from mandate of 553c, a fed agency has a further reason to make sure that its statement of basis and purpose contains a full account of its justifications for adopting its rule. If the rule is challenged as arbitrary, courts will use the agencys contemporanously stated reasoning as the sole basis for resolving the challenge. Chenery doctrine as seen in adjudicative context. Post hoc rationalizations are strongly disfavored. Reasoning for decision must be in statement of basis, not in later explanations in court.

12) Regualtory analysis

i) A regulatory analysis is an intensive, formal examination by an agency of the merits of a proposed rule. It is intended to involve a more detailed and systematic assessment than is inherent in the ordinary process of notice-comment rulemaking.

ii) At the federal level, a series of presidential executive orders have mandated that executive agencies engage in CBAs. OIRA- the office of information and regulatory affairs.

b) Executive order 12866 by clinton

i) Regulatory philosophy- federal agencies should promulgate only such regulations as are required by law, are necessary to interpret the law, or are made necessary by compelling public need.

ii) Reagan’s order=benefits must outweigh the costs. Clinton’s order=benefits must justify the costs. Sometimes benefits are hard to quantify. Clintons order focuses not just on quantitative benefits but also qualitative benefits.

iii) Triggering question: if rule costs >$100,000 –must prepare CBA

iv) The drive towards CBAs is spurred by a widespread feeling that agencies too often take actions that are not cost justified. Sometimes agencies are too focuses on one goal without seeing big picture. Can bring more harm than good sometimes.

v) Notice that not only must they do a CBA, but agency must be guided by CB considerations.

vi) Notet hat the exec order must yield to the law. so if a statute requires ana gency to do somthing, if it fials a CBA, agency must do it. public citizen v young case.

vii) Methodist Hospitals v. TX Industrial Accident Board (state case): no numbers—just said the benefits will be increased delivery and costs will be increased revenue. Ct said that they basically complied. State courts seems disinclined to police statutory CBA requirements very aggressively. Too costly for state legislatures.
Chapter 6- Rules as part of the agency policymaking process

1) Rule exemptions- good cause exemptions
   a) Federal APA 553(b)(B) — Rules are exempted from usual notice and comment procedure when it would be unnecessary, impracticable, or contrary to the public interest for the agency to follow them. The agency must make an explicit finding at the time of issuance that good cause exists and must give reasons to support that finding. (narrow construction)
   b) 553(d)(3) — For good cause an agency may dispense with the normal requirement that a rule may not become effective until 30 days after its issuance.
   c) When are usual rulemaking procedures “unnecessary” within the meaning of the Federal APA?
      i) When a minor or merely technical amendment in which the public is not particularly interested is involved
      ii) When the agency has absolutely no discretion about the contents of its rule, as where its task is merely to make a mathematical calculation or ascertain an objective fact. Since nothing the public might say could affect the rule, the agency has good cause to forego a comment period.
      iii) When the agency is acting under a congressional deadline and the details of the plans had all been aired during proceedings at the state level
   d) Direct final rulemaking is a streamlined variation on the normal 553 procedure. Agencies use it for issuing rules that they consider totally noncontroversial. Under this procedure, the agency publishes the rule and announces that if no adverse comment is received within a specified time period, the rule will become effective as of a specified later date.
   e) Impractical or contrary to the public interest — Both terms are construed as coming into play when an agency has an overriding need to take immediate action. Rules that are designed to meet a serious health or safety problem, or some other risk of irreparable harm, often qualify for exemption on this basis. Also where the usual procedures would undermine the objectives of the statutory scheme the agency is trying to enforce (price freezes).
   f) Interim-final rules — Agencies that adopt a rule in reliance on the impracticable or public interest prongs of the good cause exemption usually request comments on the rule after it becomes effective, then they may revise the rule after comments. Final in sense of going into effect, but interim in the sense that agencies will continue to study the rule.
   g) Utility sold waste case- held notice comment period was not unnecessary in this instance regarding use of software. Said it was of great interest to the public.
   h) Hawaii helicopter case- rule needed to prevent more accidents
   i) Northern arapahoe tride case- urgent hunting regs needed to avoid extinction of species.
   j) State law- 1981 MSAPA uses same langauge of fed APA. 1961 MSAPA used imminent peril to public health, safety or welfare standard. It was for emergencies.
   k) Hypo- agency adopts interim rule. Considers public comment, and adopts the rule indefinately. Then later, it is shown that initial interim rule shouldn’t be have used because no good cause exemption. Courts have struck done the later final rule. It’s a result of the mistrust of the post promulgation rulemaking process. But some cases have upheld such rules if it is shownt ah agency had taken seriously the post adoption comments.

2) Rule exemptions- procedural rules
   i) Rules of agency organization, procedure or practice are exempted from usual notice and comment procedures by 553bA. There is no similar exemption at state level. A constant problem though is distinguishing procedure from substance.
   b) US DEPT OF LABOR V KAST METALS CORP, 5TH 1984
      i) Brown case- when a proposed regulation has a substantial impact on regulated industry or an important class of members or products, notice and opportunity for comment should first be provided. The exemption does not extend to procedural rules that depart from existing practice and have a substantial impact on those regulated.
      ii) Test- in essence, the substantial impact test is the primary means by which courts look beyond the label procedural to determine whete a rule is of the type congress thought appropriate for public participation.
      iii) When a proposed regulation of general applicability has a substantial impact on the regulated industry, or an important class of the members or the products of that industry, notice and opportunity for comment should first be provided. The exemption of section 553(b)(A) from the duty to provide notice by publication and a forum for public comment does not extend to those procedural rules that depart from existing practice and have a substantial impact on those regulated.
      iv) Although the plan departed from previous inspection formula, change alone is insufficient to satisfy the twin prongs of disparate and substantial impact found in brown. The substnital impact here was purely derivative.
   c) Notes-
      i) State APAs do not exempt procedural rules form ntoice and comment procedures.
      ii) JEM broadcasting case- attempted to streamline application process by making rule they wont consider incomplete applications. Court said the rule was procedural because it did not change the substantive standards by which the FCC considers the apps. The issue is one of degree and our task is to identify which substantive effects are sufficiently grave so that notice and coment are needed to safeguard the policies underlying the APA.
      iii) Chamber of commerce case- No notice of comment given. Held opposite kast case cause it affected the substantive rights of employers. Gave certain exceptions if they did certain things. seems procedural, but will have major effect on employers.

3) Rule exemptions- exempted subject matter
   a) 553(a)(2) — Excludes rules relating to “public property, loans, grants, benefits, or contracts” from all of the provisions of 553, including notice and comment procedure as well as the requirements for deferred effective date and the right to petition.
   b) 553(a)(1) — Exempts a rule from all rulemaking procedures to the extent there is involved a military or foreign affairs function of the U.S. The legislative history and relevant case law direct that exceptions to the APA be narrowly construed, and that the exception can be invoked only where the activities being regulated directly involve a military function.
c) The APAs provide categorical exemptions from the usual notice comment requirements for rules relating to certain govt functions. Not needed to show good cause. They represent a generalized judgment that all rules falling into the defined categories should be exempt, regardless of circumstances. For the exception to apply it must be clear though.

d) Just because exemption exists, doesn’t mean agencies can have notice comment. Just means they don’t have to. ACUS encourages them to not exempt.

e) Stewart case- involved a rule by which bureau of prisons announced that it would refuse to consider persons over 34 for employment. Court held didn’t need to follow 553 because of agency management and personnel exemption.

f) 1981 MSAPA excepts from usual rulemaking procedures rules concerning only the internal management of an agency which do not directly and substantially affect the procedural or substantive rights or duties of any segment of the public.

g) 553a1 exempts a rule from rulemaking procedures to the extent that it involves a military or foreign affairs function. But DOD has a general policy of providing notice comment on rules that have substantial effect on public.

h) Independent guards case- court held that the exemption didn’t apply to a rule governing drug abuse by armed guards at a site at which the dept of energy researched and produced weapons for military. Said APA rule should be narrowly construed to give exceptions.

4) Rule exemptions- nonlegislative rules- legislative and nonlegislative rules
   a) Legislative rules are issued by an agency with the force of law. nonlegislative rules are known as guidance documents. Not based on delegated authority to enforce the laws. This is because they don’t go through notice and comment process. There has been a large increase in amount of nonlegislative rules for guidance though. agencies rely on them. more efficient.

b) Nonlegislative rules are commonly divided into interpretive rules and general statements of policy. APA 553bA and 553d2 exempt both those two categories of rules form the usual notice and comment and delayed effectivenes procedures.

b) MADA-LUNA V FITZPATRICK, 9TH 1987
   a) P was denied deferred status under 81 instruction and contends that the 81 version was invalidly adopted. INS contends they are both general statements of policy.

   b) In 553, general statements of policy don’t need notice. They are statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to use its power. They serve a dual purpose of informing the public of agency plans and priorities, and provide agency personnel with direction.

   c) Test- the critical factor to determine whether a directive announcing a new policy constitutes a rule or a general statement of policy is the extent to which the challenged directive leaves the agency, or its implementing officer, free to exercise discretion to follow, or not follow, the announced policy in a given case. Giving guidance so officers can make individual determinations is ok. in such a situation, notice and comment would be not too useful.

   d) Test- for the operating instructions to qualify under 553s general statement of policy exception, they must satisfy two requirements. First, they must operate only prospectively. Second, they must not establish a binding norm or be determinative of the issues or rights to which they are addressed, but must instead leave officials free to consider the individuals facts in the various cases.

   e) Court says the current statement was ok because not binding and operated prospectively. It’s a general statement of policy.

   f) Court rejects substantial impact arg made by P. just because it has a substantial impact doesn’t mean notice and comment are necessary. Everything might have a substantial impact on someone.

   g) Notes

   i) Pacific gas and electric case- agency says we will rank order the cut off priorities we will observe in event of shutdown. Agency wanted to dictate those priorities without notice and comment. Court held that the pronouncement was valid as a policy statement without notice and comment. Agency said, if you adopt these priorities, we will look favorably on it. Court said it was ok because they didn’t do it in a binding manner. And if you have a problem you can raise it in individual proceedings. Courts decision isn’t convincing though because agency is not likely to change their mind in individual proc.

   ii) McLouth steel case- EPA used a model, witout comment, to decide what mathematical ratio of stuff in sludge would make it illegal. Court said EPA was treating the model as a rule and it was invalid.

   iii) Panhandle case- ERA made a presumption favoring certain imports. Some complained. Court said that ERA had not treated the guideline as guiding precedent, so it did not have force of legislative rule, so it was ok. says its not as if agency cant refer to their statements. They just need to have a good explanation for their decision, other than reliance on their stateement.

   iv) State MSAPAs contains no general exemption for policy statements. But does contain some narrow exceptions that exclude from usual rulemaking requirements many pronouncements that would also eb policy statements under federal APA 553bA.

5) Rule exemptions- nonlegislative rules- interpretive rules
   a) HOCTOR V US DEPT OF AGRICULTURE

   i) Animal welfare act lets USDA adopt rules to govern the care of animals by dealers. Using notice and comment they adopted a rule. Later they adopted an internal memo saying all dangerous animals must be inside fence at least 8 feet high, without notice or comment.

   ii) Govt agencies must interpret their rules. It does the public a favor to announce its interpretation in advance of enforcement.

   iii) At htether extreme from what might be called normal interpretation is the making of reasonable but arbitrary rules that are consistent with the regulation under which the rules are promulgated but not derived from it, because they represent an arbitrary choice among methods of implementation. A rule that turns on a number is likely to be arbitrary in this sense.

   iv) Legislators have democratic legitimatimacy for their value judgments. When agencies are attempting to make arbitrary rules, the notice and rulemaking procedures must be used.
v) We are not saying cant ever have numbers in interpretative rule. In technical areas where quantitative criteria are common it may be ok. or it may be ok to use as a rule of thumb to guide the application of the rule. For example, agency could have said that to secure dangerous animals, a fence of 8 feet seems appropriate. But making it a clear cutoff point is arbitrary.

vi) Depts position is further weakened by fact that they used notice and comment for deciding fence criteria for monkeys and dogs. Picciotto case said that agency precedent can play factor. demonstrates that agency thought they were making a rule.

b) Notes-

i) Intent standard- courts may look to whether agency intended to exercise its delegated authority to make law, as opposed to interpreting existing text.

ii) American mining congress case- agency issued letter stating the level when black lung exists for reporting obligations. Court held that the letter was a valid interpretative rule that construed the term diagnosis in the existing legislative regulation. (that seems inconsistent with our case. May be its different because its telling people what they should do to meet regulation. Animal case was telling them what they must have and that would cause a major change for them)

iii) A number of cases have held that a purported interpretive rule is invalid if it is inconsistent with a prior interpretive rule, because the agencies change in position can be accomplished only through notice and comment rulemaking.

iv) Appalachian power case- if agency acts as if interpretive rule is controlling, or leads others to believe it is the law, or treats it as a legislative rule, it is for all practical purposes, binding and must have proper procedure.

v) Why is there an exemption for interpretive rules- notice and comment procedure is too costly and time consuming. When agency is interpreting they are providing some kind of guidance to public. Legislative history of APA suggests that interpretive rules don’t require notice because they are subject to plenary judicial review.

vi) 1981 MSAPA contains an exception for interpretive rules that is narrower than the federal APA. Under 1981 MSAPA, while interpretive rules might not be binding on public, they are binding on the agencies.

6) Required rulemaking- federal law

a) NLRB V WYMAN-GORDON CO, SC 1969- no majority opinion here

i) NLRB based their decision regarding Wyman-Gordon on another case. The NLRB in the other case had set forth a rule, but did not apply that rule in that case. There is no question that, in an adjudicatory hearing, the Board could validly decide the issue whether the employer must furnish a list of employees to the union. The plurality says that the court should have used rulemaking, but in the present case, Wyman-Gordon was given a full adjudicatory proceeding. Since this was not a rule, Wyman-Gordon gets a chance to argue that the agency’s decision in Excelsior was wrong. This kind of works like res judicata, so parties are not bound by what the NLRB does in other cases. So agencies can use adjudication, but precedent will not be treated as deferentially as rulemaking.

ii) In an adjudication, the bd could make a decision about what that party had to do, but cant make general rules. But cases can be vehicle for precedent. Provide a guide to action that agency may be expted to take in future cases. but cant just make rules. Courts main opinion says that the bd ignored rulemaking procedures in excelsior. They were saying bd cant make rules in adjudications. But they still hold that the order against wyman was valid.

iii) Concurrence- line between adjudication and rulemaking is not always clear. Precedent is just as much aguide as rules. Both are subject of judicial review. The agency met the procedural reqwuirements for an adjudication, so that’s good.

iv) Harlan dissent- cant announce a rule in adjudication and not even apply it to the party before you. Can only make an order at adjudication, not rules. Cant adjudicate for future effects. Cant make rules in adjudication.

b) Notes-

i) Reasons why rulemaking would have been better: B/c they have an alt route available, they should use the rulemaking route (more legitimate); opportunity for everyone to be heard—notice & comment gets wider range of perspective; better opportunity for those affected to shape the board’s position.

ii) GE case- court said it can violate DP to apply new preedent on someone who couldn’t have expected it.

iii) St francis note case- agency made a rule in earlier case. Then hospital said we don’t like it. agency said too bad. On appeal, agency said cant make adjudication rule binding. So must give opportunity to be heard and chance to argue case if no rulemaking. So they cant make it binding if they didn’t use rulemaking. So there is incentive to use rulemaking. If you are willing to pay price of makking a rule, you can make it binding on everyone.

c) NLRB V BELL AEROSPACE CO, SC 1974

i) Courts very deferential to the Board’s decision that adjudication is more efficient than rulemaking. Will allow the board to develop its rules through case law rather than through rulemaking. An administrative agency must be equipped to act either by general rule or by individual order. To insist upon one form of action to the exclusion of the other is to exalt form over necessity. The choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency.

ii) Exception: When party relied on the old rule. But Board remains able to replace old principles w/ new principles but doesn’t have to use a rulemaking proceeding—can cut slack to those who relied on the old rule. However, this is not a case in which some new liability is sought to be imposed on individuals for past actions which were taken in good faith reliance on Board pronouncements. Nor are fines or damages involved here.

iii) Bell aerospace is now the law and wyman gordon has been pushed aside. Purely prospective adjudication doesn’t happen much anyway.

d) Notes-

i) Bell aerospace alludes to three situations when might require a different result- 1) adverse consequences of retrospective adjudication lawmaking would be substantial to parties who had relied on past decisions 2) new liability is sought to be
imposed retrospectively by adjudication on individuals for past actions which were taken in good faith reliance on agency pronouncements 3) fines of damages are involved

ii) 5 factors as to whether rule from adjudication is unfairly retroactive - whether it was issue of 1st impression, whether new rule represents a departure from old, extent of reliance on old rule, the burden the retroactive rule imposes, and statutory interest in applying new rule to case at hand despite reliance on old rule.

iii) Ford motor co case- found agency abused its discretion. So it does happen.

7) Petitions
   i) 553e authorizes members of the public to petition an agency for the issuance amendment or repeal of a rule. It forces agencies to reexamine the status quo. It also supplies public input when an agency has adopted a rule without advanced notice under 553 exemption.

   ii) Both MSAPAs require a statement of reasons for denial of a rulemaking petition. 553e does not, but 555e requires a brief statement of the grounds for denial of any application of petition filed with an agency. The requirement of an explanatory statement is important, because it forces agencies to consider carefully their precise reasons for any such denial, thereby discouraging automatic or impulsive dismissals of rulemaking petitions.

b) WWHT V FCC, DC 1981

   i) Whether, and under what circumstances, a reviewing court may require an agency to institute rulemaking proceedings after the agency has denied a petition for rulemaking — Where the proposed rule pertains to a matter of policy within the agency’s expertise and discretion, the scope of review should “perforce be a narrow one, limited to ensuring that the Commission has adequately explained the facts and policy concerns it relied on and to satisfy ourselves that those facts have some basis in the record.” Where the agency decides not to proceed with rulemaking, the record for purposes of review need only include the petition for rulemaking, comments pro and con where deemed appropriate, and the agency’s explanation of its decision to reject the petition.

   ii) The commission is required to give some explanation of its actions. This enables a reviewing court to satisfy itself that the agency’s action was neither arbitrary, nor capricious, nor an abuse of discretion, nor contrary to statutory proc or const req.

   iii) The 1981 MSAPA requires an agency to act within 60 days, either to deny the petition, to initiate rulemaking proceedings, or adopt a rule. 553e of the fed APA contains no time limit. But 555e says it must be prompt.

   iv) In re international chemical worker case- court must consider 4 factors in determining whether an agency’s delay is unreasonable - length of time, reasonableness of the delay in context of the statute which authorizes agencies action, consequences of the delay, and any plea of administrative error, convenience, resources, and practical difficulties. There is a point when a court must let the agency know, enough is enough.

8) Waivers
a) WAIT RADIO V FCC, DC 1969

   i) FCC rejected Waits application for authority to operate its station on an unlimited basis. court holds that agency erred by not giving adequate reasons for denying and refusing to hold a hearing on appellants request for waiver of certain FCC rules and case is remanded for further consideration. Court holds commission must state its basis for decision with greater care and clarity than was given. Necessary for judicial review.

   ii) Agency doesn’t have to grant all apps for waiver. But must give htem a hard look and see if it would be in public interest, or consistent with policy reasons for general rule. A rule is more likely to be undercut if it does not take into account considerations of hardship and equity.

b) Notes
   i) Scalia (in KCST-TV v. FCC (D.C. Cir)) says that WAIT only requires consideration of waivers when the agency is dealing with a rule which otherwise might be impermissibly broad. It is possible that rules can be crafted which do not require the availability of an exemption to make them valid, either because the rule is so precise or because the subject is not one as to which precision is required.

   ii) SC showed that WAIT shouldn’t be read too broadly. Heckler case, but that decision just held don’t need a waiver provision. There there had been no application for a waiver. Not every rule must have some meaningful opp for waiver. Result would be not rules, but case by case adjudication.

   iii) Florida waiver- requires agency to grant waiver when purpose of rule has been achieved by other means, and application of rule would create a hardship. Gives lots of flexibility.

   iv) Iowa waiver- agency shall waive one of its rules upon a shwoing that application of the rule to petitioner would not serve any of the purposes of the rule. Look to undue hardship, public interest, and rights of others.
Chapter 7- political control of agencies

1) Nondelegation

   a) Early cases up to new deal-
      i) Field v. Clark- said congress cant delegate their power to president, but said that in this instance, they weren't so law upheld. But really congress was delegating and court allowed it. Court said congress must establish an intelligible principle to guide.
      ii) In 1935 congress held two statutes unconst under the delegation doctrine. Only cases overturned under the doctrine. Must be viewed in light of judicial activism of that era. The cases were Panama Refining Co v. Ryan and ALA Schecter Poultry Corp v. US. Held laws invalid because lacked an adequate standard to govern.

   b) Since new deal-
      i) SC returned to giving lip service to doctrine but not striking anything down.
      ii) Yakus v US- congress is free to choose its standards. Flexible. Only if we could say that there is an absence of standards for the guidance of the agency, so that it would be impossible in a proper proceeding to ascertain whether the will of congress was obeyed, would we be justified in overriding its choice of means for effecting its declared purpose of preventing inflation.

   c) AMALGAMATED MEET CUTTERS V CONNALLY, FSUPP 1971
      i) Economic stabilization act gave pres power to issue such orders and regs as he may deem appropriate to stabilize prices. Due to inflation from war. Ps argued this gave unbridled power to pres. Gov args its ok under yakus.
      ii) The burden is on the party who assails the leg's choice of means for effecting its purpose, a burden that is met only if we could say that there is an absence of standards for the guidance of the admin's action, so that it would be impossible in a proper proceeding to ascertain whether the will of congress has been obeyed.
      iii) The act supplied sufficient standards and court can look beyond words to leg history. The act is not immune from judicial review, but it satisfies the standard.

   d) INDUSTRIAL UNION DEPT, AFL-CIO V AMERICAN PETRO INST, SC 1980
      i) Osha law gives power to sec of labor to adopt safety standards. They must be reasonably necessary or appropriate to provide safe or healftful places of employment. OSHA construed the act to require it to set standards at the safest possible level which is technologically feasible and which would not cause material economic impairment of the industry. So it set very strict health standards.
      ii) A four justice plurality overturned a benzene standard. But they said the delegation was ok
      iii) In the absnce of a clear mandate in the act, it is unreasonable to assume that congress intended to give the sec the unprecedented power over american industry that would result from govt's view of OSHAs policy. Such a sweeping delegation of power might be unconst under schecter and panama. A construction of the statute that avoids this kind of open ended grant should be favored. So benzene standard was no good, but act is ok.
      iv) 3 important functions of nondelegation- ensures decisions are made by congress and people, provides intelligible principles, allows for judicial review to test if principles given are applied right. Rejects death by association of panama cases.

   e) WHITMAN V AMERICAN TRUCKING ASSN, SC 2001
      i) Clean air act requires EPA to set air standards. First step in assessing whether a statute delegates legislative power is to determine what authority the statute confers.
      ii) The text of this law does not mention considering costs in air quality. Court refuses to find implicit in text need to consider costs. Congress does not hide elephants in mouseholes.
      iii) Const vests all legislative power in congress. Congress must lay down by legislative act an intelligible principle to which the agency authorized to act is directed to conform. Agency cant cure an unlawful delegation by adopting a limiting construction on a statute.
      iv) Court says scope of delegation is well within const permissible limits. We have almost never felt qualified to second guess congress rearding the permissible degree of policy judgment that can be left to those applying the law. Certain degree of discretion is needed.
      v) Stevens concurring- court should stop speaking in fictions. Should just recognize, not pretend, that the legislature is delegating its legislative power. Rulemaking authority is legislative power. Those provisions of the const though, do not limit the ability of the leg to delegate their power to others. As long as the delegation provides a sufficiently intelligible principle, ther eis nothing inherently unconst about it.

   g) Notes-
      i) Safeguards- can the presence of safeguards serve as a check in lieu of meaningful legislative standards. Some argue yes. Davis argues there should be more of a focus on safeguards than on standards. Safeguards are more important than standards. Weakness of standards is that legislators are often unable or unwilling to supply them. Some disagree though.
      ii) Args for nondelegation doctrine- Scalia says delegation doctrine has problems because it is so vague. In benzene case it was court for example, that did work instead of congress. But he says the alternative is worse because unbridled discretion for agencies has no accountability.
      iii) Args against nondelegation doctrine- legislators and judges are not equipped to make these specialized decisions. Congress doesn't have time or resources to decide everything. Also says that delegation promotes democratic values. Pres. elections.

h) NONDELEGATION FOR STATE AGENCIES
i) **THYGESEN V CALLAHAN, ILL 1979**

   i) Case involved challenge to Illinois currency act. Court looks at state stoteur decision. Said must have guiding principle and intangible standards. Meant to be responsible to public and have judciual review. Legislative delegation valid if it sufficiently identifies: 1) the persons and activities subject to regulation, 2) the harm to be prevented, 3) the means intended.

   ii) Here, leg never identified the harm to be prevented nor means to do so. No meaningful standards either.

j) **Notes-**

   i) Numerous courts have taken the presence of procedural safeguards into account in applying delegation doctrine. But some states reject this approach. Askew case- becuse the statute transferred power to agency, it was invalid despite safeguards.

   ii) Sometimes delegate power to private persons. This raises issues. In Carter coal, the court invalidated a law that allowed affected minors to set minimum wages. Since 1936 though, federal courts have upheld a number of delegations of government authority to private persons. State cases often reject such delegation.

2) **Rationale for political review**

   a) Courts are not elected or directly responsible to the people. Execs and leg are directly checked by public opinion. Agencies should be directly accountable to those authorizing their rulemaking actions. Also, legs and execs can react more quickly to agency decisions.

3) **Legislative controls- the legislative veto**

   a) **IMMIGRATION AND NAT SERVICES V CHADHA, SC 1983**

   i) §244a1 gave attorney general discretion to suspend the deportation order of an alien and AG delegated this power to the INS. Immigration judge held Chadha deportable but let him stay because of extreme hardship. §224a2 says that if a deportation order is suspended, either the house or the senate can pass a resolution stating that it does not favor suspension of the deportation order. In Chadha, the house vetoed his suspended deportation and he claims that such a veto is unconst.

   ii) Court began with presumption of validity.

   iii) Convenience and efficiency are not the primary objectives of democratic govt. Policy arguments of useful political inventions are subject to the demands of the const. The const is explicit and unambiguous. All leg powers shall be vested in senate and house. Every bill shall be presented to pres. Every order resolution or vote shall be presented to pres and shall be approved by him.

   iv) The action at issue here was essentially legislative. Altered the legal rights of persons, including the AG, agency, and Chadha. Disagreement with the AGs decision on deportation involves determinations of policy that congress can implement in only one way, bicameral passage through presentment to pres.

   v) Powell concurring- hundreds of laws with legislative vetoes in them. Congress views this as essential. The holding here should do no more than decide this specific case on narrow grounds. Would hold it was unconst on separation of powers grounds because it has assumed a judicial function in this case. It was clearly adjudicatory.

   vi) White dissenting- Should have decided case on narrower grounds. The legislative veto is necessary. Congress has hobsons choice- either to refrain from delegating the necessary authority, leaving itself with hopeless task of writing regulations, or it can adjudicate its lawmaking function to executive and have no further say in process. The legislative veto is efficient and useful. Preserves congresses control over lawmaking.

b) **Notes-**

   i) Court intened Chadha to apply to both adjudication and rulemaking. Court a couple weeks later struck down similar veto on rulemaking. And that was a two house veto.

   ii) Courts analysis has changed-

      1) Bowsher v Synar- court found explicit in const that congress play no role in execution of laws. Congress may not remove an officer who is engaged in executive functions, even if it complies with clauses of const.

      2) Implication f MWAA case- court has become less interested in classifying a congressional action as legislative or executive. Instead, court will simply ask whether congress has sought to take legally binding action through a means other than the full enactment process. If it has, the action violates separation of powers principles and is unconst.

   c) **Line Item Veto**

   i) Clinton v city of NY, SC 1998-

      1) Court held act unconst asserting that cancelatution procedure would have allowed the pres, in legal and practical effect, to amend the appropriations act by repealing a portion of it. Const did not allow him to do that unilaterally. It would otherwise permit the pres to make a new law not voted on by congress. Would alter carefully drawn lawmaking procedures from const.

      2) 3 modes of analyzing sep of powers- bright line rules under const (Chadha, Clinton), functional approach that balances power between branches, individual liberties analysis (look to what happened to Chadha).

4) **Legislative controls- alternatives to the legislative veto**

   a) Congressional review act, CRA, requires that virtually all rules of general applicability be submitted to congress and to the general accounting office before they take effect. Distinguishes between major and non major rules based partly on economic signifiance. But satisfies presentment clause and rules under Chadha.

   b) Effects of CRA disapproval- if final rules go into effect before congress disapproves them. If a rule is eventually thrown it, it must be treated as if it never existed. If a rule is disapproved, the agency may not reissue the rule in substantially the same form.

   c) Suspensive veto- may a state adopt a statute that authorizes a legislative committee to suspend an agency rule for a limited time period. Issue in Martinez v DILHR case- allows leg committee to suspend rule for followong reasns- absence of state authority, emergency, failure to meet leg intent, conflict with state law, changed circumstances, arbitrary or capricious or hardship. Case involved agency that adopted a sub minimum wage for certain workers. Leg suspended the rule. Wsc SC said
separation of powers didn’t prohibit this. Said sharing of branches power was ok as long as not unblanced. Not a situation where one branch interferes with a const guaranteed exclusive zone vested in another branch.

d) Grounds for objecting- the suspensive veto statute in martinez gave limited list of grounds on which committee could object. This is common. The 1981 MSAPA says leg comm should only object to a rule if it is beyond the agencys procedural or substantive authority. Bonfield argues that leg shouldn’t be allowed to object on pure policy grounds, and that MSAPA’s right. but others disagree and think political realities must be considered. Legislative review of admin rulemaking is almost certain, to be political review- Barker case.

5) Legislative controls- other legislative controls
a) Agencies budgets are controlled by leg. Senatorial hearings to consider confirmatio of politically appointed personnel often focus on policy issues and involve scrutiny of an agency’s performance. Investigations and hearings- committees can investigate agencies. Can request documents and subpoena. GAO can also check them for efficiency. A few states have created offices that investigate agencies complaints.

6) Executive controls- appointment power
a) BUCKLEY V VALEO, SC 1976
i) Art 2, §2 cl 2- pres shall nominate, and with advise and consent of senate, shall apoint al other officers of the US, but congress may by law vest the appointment of such inferior officers, int eh pres alone, in the courts of law, or in dept heads.
ii) The fed election comission is made of 8 members. Two are appointed by pres of senate and two by speaker of the house. 2 more by pres.
iii) We think that any appointee exercising significnat authority is an officer of the US and therefore must be appointed in manner of const. surely the commissioners before us are at the very least inferior officers within eh meaning of the clause. while the second part of the clause authorizes congress to vest the appointment of the officers described in that part in the courts of law or agency heads, neither the speaker of house or pres of senate comes within this langauge.

b) Notes-
   i) Morrison v olsen- court upheld the statute that allows a special court to apoint independent counsel to investigate and prosecute possible violations of fed law by high ranking exec officials. Court said line between inferior and principal
   officers was far from clear, but here they were inferior. Scalia dissented saying it was a principal officer.
   ii) Incongruous interbranch appointments were prohibited by the const. but there was nothing incongruous about the appointment of the independend counsel by a special court, because judicial appointments of prosecutors had a long history.
   iii) Edmond v US- Held that members of the coast guard court of criminal appeals, tribunal that hears court martial cases, were inferior rather than principal officers. Thus they could be appointed by secretary of transportation. Inferior officers conntates a relationship with some higher ranking officers below the pres. depends on whether he has a superior. Clause designed to preserve political accountability relative to important govt assignments. Inferior officers are officers whose work is directed and supervised at some level by others who were appointed by pres through senate.
iv) Freytag—Tax Court was created with both regular judges and special trial judges. Special trial judges were to be appointed by the chief judge of the court. Both majority and concurrence agree that the special trial judges are “inferior officers.”
   v) Mere employees of an agency (who do not exercise significant authority) don’t need to be hired pursuant to the appts clause.
   vi) DC circuit interpreted term officers of the US narrowly in Landy v FDIC. Held that the admin law judges of Fed Dep insurance corp were employees and thus did not have to be appointed under appts clause. this is because could never render final decisions on their own but only make recommendations.
   vii) Parcell v state- similar facts to buckley. Court endorsed a balancing test consisting of four criteria: 1) the nature of power being exercised by agency 2) degree of contrl being exercised by leg 3) whether legs goal was to cooperate with exec or establish dominance 4) practical results of belnding of leg and exec power. Court held that goal of legislation was to increase pub trust in elected officials, and appt scheme gives commission needed independence should it be called upon to investigate those officials who appointed some of its members.
   viii) State bd of ethics for elected officials v green- court upheld similar scheme because the appointees are not subject to such significant legislative control that the leg can be deemed to be performing executive functions.
   ix) Const limits on legislautures ability to place hteir own members in admin positions tend to be particularly strict. This is found in incompatibility clause of const. no senator or rep shall, during time elected, be appointed to any civil office.

7) Executive controls- removal power and the independent agency
   i) except in its provisions on impeachment, the const does not expressly speak to question of removing admin officials.
   ii) myers v US- issue arose when president wilson discharged postmaster. The discharge violating a statute that required consent of senate for removal of postmaster. Court held that congress could not limit pres removal power over any officer of the US whom pres appointed. power to remove is an incident of the power to appoint. Pres has const duty to execute laws.

b) HUMPHREY’S EXECUTOR V US, 1935
   i) FTC act said that commiss could only be removed for good cause type reasons. FDR removed the commiss for pol. reasons.
   ii) Commision is supposed to be nonpartisan. Must be impartial. It is charged withh enforcement of no policy except the policy of the law. Myers decision is not controlling. The FTC cannot be characterized as an arm of executive because has leg and jud functions. Must be free from executive control. Const does not give illimitable power of removal to pres for officers of independent agencies. The authority of congress in creating quasi leg and quasi jud agencies, includes authority for them to act independent of executive. If pres could fire htem whenever, they wouldn’t be independent of pres.

c) Notes
   i) The most fundamental characteristic of an independent agency is that its heads may not be removed by the pres except for good cause.
ii) What is the real significance of the independent agency—both subject to APA and judicial review. Somewhat more autonomy from pres though, protected against discharge except for cause. But as a practical matter they both work closely with the pres. all must submit budgetary requests. Many think its more like a regular agency then we want to believe, not to differenit, but do have more independence from exec.

d) MORRISON V OLSEN- 1988
i) Act provided that AG could only remove independent counsel for good cause. Under Morrison the majority found that the independent counsel was an inferior officer. Special ct can appoint independent counsel b/c inferior officer.
ii) This case does not involve an attempt by congress to gain a role in removal of exec officials. Puts removal power in hands of exec. Congress doesn’t need to approve the removal. Gov args that its unconst because unlike humphrey, this isn’t quasi leg or quasi jud. Court says it doesn’t turn on whether position is purely executive.
iii) The goal is to ensure that congress doesn’t interfere with pres exercise of the executive power and his const appointed duty under art II. Myers was correc that some officials are purely exec and must be removable at will of pres. there are also quasi functions that are not essnetial to pres power under art II.
iv) The real question is whether the removal restrictions are of such a nature that they impede the pres ability to perform his const duty, and the fuctions of the officials must be analyzed in that light.
v) We do not see how the presidents need to control the exercise of the discretion of the independent counsel is so central to the functioning of the exec branch as to require as a matter of const law that the counsel be terminable at will of pres.
vi) Nor do we think the good cause removal provision at issue impermissibly burdens the pres power. The exec retains authority to terminate counsel if not meating statutory responsibilites.

vii) Final question is whether the act, taken as a whole, violates the sparation of powers by unduly interfering with exec brnach.
We have never held that the const requires that the three branches of govt operate with absolute independence. This here was not an attempt by congress to gain power. The case does not pose a danger of congressional usurpation of exec branch functions. Congress retained no power by the act. No judicial usurpation either. Doesn’t disrupt the balance.
viii) Morrison test- first whether it takes away pres const art II powers. Second whether it violates separation of powers and balance of power portion of const.
ix) Scalia dissent- art II give all exec power to pres. The pres here is purely executive, so it must be under power of pres. the statute deprives the pres of his exclusive power under const. no dispute that function of indep counsel is exec.
e) Notes-
i) Legislative removal- while humphreys, wien, and morrison, declare that congress may limit the pres power to remove some agency officials, it does not follow that congress may retain for itself the power to remove officials engaged in admin functions. Bowser case. Congress has no exec power to remove.
ii) Mistretta v US- once again the court displayed a flexible permissive stance toward an admin structure that did not fit easily into the traditional allocation of powers among the branches of govt. case involved US sentencing commission. Court called agency peculiar because congress had designated it an independent commission in the jud brnach, and several seats were reserved for judges. Court upheld it anyway because the commissions structure did not unduly strengthen or weaken the jud branch.

iii) State law- Vary dramatically from state to state. Most state const, unlike the fed, explicitly vet removal authoirty in the gov. but in some states its not absolute.

iv) Inferring tenure- in the absence of specific provision to the contrary, the power of removal from office is incident to the power of appt. keim v US.
v) Where the term of office is unspecified, courts are strongly inclined to find that the officer serves at pleasure of appointing authority. Otherwise, they could remain for life if no misconduct. Shurtleff v US.

vi) Watson v penn turnpike commission- PA- court held that a statute fixing the term of an officer deprived the gov of the authority to remove the officer at will. It is presumed that the creators of the office intended the occupant to serve out the term unless good cause could be shown as to why he should be removed.

8) Executive controls- executive oversight
i) While agency officials are rarely removed, OIRA does have noticable presence and impact in rulemaking.
ii) Agencies normally maintain a significant working relationship with the pres. pres typically coordinates their activities, defends them against criticism, and guides their policy. The office of info and regulatory affairs OIRA, a division of OMB, regularly conducts oversight of significant rulemaking proceedings on behalf of white house.

b) Exec order 12866-
i) Each agency shall make goals with vice pres. shall have a regulatory plan. Each agency shall prepare a regulatory plan of important significant regulatory actions planned for the year. Shall be approved by agency head. OIRA reviews them to see if consistent with principles of this order or pres wishes.
ii) Kendall v US ex rel stokes, 1838- Agencies are subject ot the ctrl of the law, not just ot the direction of the pres. postmaster general is not subject to pres alone. Pres can see the laws faithfully executed, but cannot make law.

iii) Youngstown sheet and tube v sawyer, 1952- Truman used EO to take control of steel mills during strike during korean war. Court held the seizure invalid. Not authorized by statute and not justified by commander in chief powers, not military. Cant make laws, only execute. This falls into jacksons third category here.

iv) Jackson famous concurrence- three situations. 1) pres acts with implied or express grant from congress. Then has most power. 2) absence of statutes. Pres can only rely on his own independenyt const powers and has less authoirty than 1st situation. There is a zone of twilight in which he and congress may have concurrent authority, or in which its distribution is
uncertain. In this area, depends on events and facts rather than theory. 3) pres takes action incompatible with express or implied will of congress. Pres has least power here.

v) Some say that at least OIRA has significant advantages over courts though. OIRA may be better experienced than judges to decide. OIRA is more flexible and can decide faster than courts. (but they are politically motivated and cannot impartially decide if statute is being followed correctly in the way the courts can). OIRA is also more politically accountable than courts.

vi) Legality of executive oversight- The EO repeatedly says only to the extent permitted by law. Congress didn’t authorize presidential review. This falls within second jackson category. Legally rooted in pres authority under const. but it could also be argued that congress has implicitly directed pres not to involve himself in agencies rulemaking.

vii) Independent agencies- independent agencies are exempted from EO 12866. But justice dept maintains pres has authority to prescribe OIRA review of such agencies. ACUS recommends that pres review of rulemaking should apply to independent agencies because there is no meaningful difference.

c) State exec review

i) Cali- exec branch agency OAL must approve virtually all admin rules. Decides whether a rule is necessary based on evidence of record. Also decides if rule meets test of legality and whether APA was complied with. OAL is viewed as construtive and useful.

ii) Notice differences between OAL and OIRA. OIRA is openly political. OAL doesn’t receive input from gov but rather conducts a judicial type review process.

iii) In some states rules may not take effect without the gov’s approval. In some gov can refuse for any reason. In some rules go into effect without approval, but gov can rescind them.
Chapter 8 - the scope of judicial review  

1) Issues of basic fact

i) §706(2)(A): agency factfinding in informal adjudication allows reviewing ct to reverse agency only if its findings are arbitrary, capricious, or an abuse of discretion=essentially an assessment of the reasonableness of agency action

ii) §706(2)(E) substantial evidence test= A reasonable person could have believed it and its supported by substantial evidence (similar to reviewing a jury verdict). This is for formal adjudications I believe. And in formal Rule making.

b) UNIVERSAL CAMERA CORP V NLRB, 1951 SC

i) Court uses ‘substantial evidence’ test. Defers to the board as experts. Ct must consider the record as a whole: i.e. if there are competing stories either of which the Board might reasonably believe. The Court has to look at both sides. ALJ and the Board disagreed. No stricter standard of review—same substantial evidence standard. ALJ’s decision is part of the record. Give ALJ’s decision the probative weight it demands.

ii) Courts interpret evidence to mean substantial evidence, more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the document sought to be drawn from it is one of fact for the jury.

iii) The substantiality of evidence must take into account whatever in the record fairly detracts from its weight. Cant just look at evidence board used to make decision. Must look to all evidence, including contradictory evidence.

iv) Here, case remanded because the court deemed itself bound by the bd’s rejection of the examiners findings because the court considered these findings not as unassailable as a masters. They are not. The plain language of the statute directs a reviewing court to determine the substantiality of evidence on the record including the examiners report. The substantial evidence test is not modified when the bd and its examiner disagree. The findings of the bd must be considered along with the consistency and inherent probability of the testimony. Substantial evidence is a statutory standard. court is obliged to apply lenient test.

v) the bd’s findings are entitled to respect; but they must nonetheless be set aside when the record before a ct of app clearly precludes the bd’s decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence.

vi) the substantiality of the evidence must take into account whatever in the record fairly detracts from its weight. (means that just because you have testimony on your side, that not enough. Must look to whole record and rebut other sides case as well)

vii) if two reasonable views, should uphold view taken by commissioner.

c) Notes-

i) Why give this deference to the agency: Agencies specialize and develop expertise in the areas they regulate. Their fact-finding process reflects that expertise; Because fact-finding is an essential element of the delegated power, the legislature intends a court to respect these findings, absent a very serious error by the agency; Discourages disappointed litigants from appealing; Limits the ability of a court to impose its values in place of the agency’s values.

ii) Difficult to distinguish between the two tests. Substantial evidence and clear error. Rule of thumb test- if the appellant can convince the appellate court that the admin finding of facts is obviously just plain wrong, and if the appellant can at the same time arouse the court with a desire to correct the error, the court can always find means to doso, whatever label is used.

iii) Not all states follow universal camera. In wis, the agency heads must explain their disagreement with the ALJs credibility findings. Court must reverse if decision isn’t explained.

iv) SC review of court of appeals- In universal camera, cour noted that it would seldom overturn a ct of app decision applying the substantial evidence test. but court did so in Allentown mack sales case.

2) Issues of the law

a) CONN STATE MED SOCIETY V CONN BD OF EXAMINERS IN PODIATRY, CONN 1988

i) The trial court may not retry the case or substitute its judgment for that of the agency on the weight of the evidence or questions of fact. Rather, an agency’s factual and discretionary determination are to be accorded considerable weight by the courts. On the other hand, if the function of the courts to expound and apply governing principles of law. this case presents a question of law turning upon the interpretation of a statute. The intent of the legislature must be determined.

ii) Ordinarily, the construction and interpretation of a statute is a question of law for the courts where the administrative decision is not entitled to special deference, particularly where, as here, the statute has not previously been subjected to judicial scrutiny or time tested agency interpretations. We conclude there, that it was not the intention of the legislature to empower the bd to define the scope of podiatry practice in conn.

b) CHEVRON INC V NATURAL RESOURCES DEFENSE COUNCIL, SC 1984

i) Issue here is agencies interpretation of statute regarding air pollution.

ii) When ct reviews agencies construction of statute which it administers, two questions. 1) whether congress has directly spoken to the precise question at issue. If the intent is clear, that is the end of the matter. Court and agenc must give effect to the unambiguously expressed intnet of congress. 2) if congress has directly addressed question at issue, court doesn’t just impose its own interpretation. If the statute is silent or ambiguous, the question for the court is whether the agencies answer is based on a permissible construction of the statute. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.

iii) If congress was unclear, the issue is not whether the bubble concept is inappropriate, but whehter the agencies view that it is appropriate is a reasonable one.

c) Notes-

i) Poditory case is dominant view among states. Some states follow strong deference of chevron.
ii) Factors indicating that an agency has a comparative interpretative advantage over a court - Comparative competence over complex matters. But court may be better at nontechnical statutory interpretatin. Greater deference is owed to an agencies interpretation of its own rules than to its interpretation of a statute.

iii) **Factors indicating that an agency interpretation is probably correct** - The procedures used by the agency to enact its rule. Thoroughness of the consideration. Greater deference shall be given to an interprreation made contemporaneously with enactment of statute. Long standing construction Greater deference of consistently maintained interpretation. More deference when public relies on interpretation. Reenactment. Greater deference is legislature endorses it.

d) Exceptions ot chevron-

i) Chevron deference Weakened by *Mead* and *Christensen*, which applied *Chevron* only to legislative, notice and comment legislative rules and formal adjudications, not letters, enforcement guidelines, policy manuals, etc.

ii) Constitutional issues- no deference over cons questions. Miller case.

iii) Cant discrad one interpretation in favor of another after first was affirmed by the SC. Iechmere case.

iv) Agencies interpretation that limits a private right of action conferred by statute on one private party against another, not entitled to deference. Adams fruit case

v) Martin case- suggested that chevron does not apply to an interpretative rule.

vi) But chevron is not applied as deferentially as one might think. Courts are more often willing to find statutes clear with respect to issue in controversy.

vii) FDA v williamson tobacco corp case- FDA issued controversial regulations. Court found the regulations unlawful 5-4. A reviewing court should not confine itself to examining a particular statutory provision in isolation. **Must be placed in context with view to overall statutory scheme**. Said FDCA says FDA doesn’t have authority over tobacco except to ban it entirely. Cant regulate it cause not a food.

viii) INS v st cyr case- congress said aliens guilty of certain felonies are deportable. Court held that law didn’t apply to aliens who pled guilty prior to the law. We only defer to agency interpretations of statutes that are ambiguous, when applying the normal tools of statutory construction. **No ambiguity exists here because retroactive laws are disfavored**.

ix) Solid waste agency case- court refused to defer to agencies interpretation because the agencies construction would raise significant constitutional difficulties.

x) Courts decide on their own, without deference, issues arising under generic statutes such as the APA and freedom of info act. Metropolitan stevedore case.

e) Applying step 2- agencies usually win at this stage

i) ATT corp case- court held that FCC could not require local telephone companies to provide new competitors with unlimited access to their facilities. Agency interpretation held unreasonable cause act requires some limiting standard.

ii) **Court, as of 1997, has never struck a rule under step 2 cause it seems bad. So rules are often struck under step 1, that ruling conflicts with the meaning of the statute. Don’t want to call agency actions unreasonable. Better to overturn on step 1 than step 2. Don’t want to seem like judicial activists. Could also look to legislative history.**

3) Exceptional cases

i) *Chistensen v harris county*- county workers sued under FLSA. Court is confronted with an interpretation contained in an opinion letter, not made after formal adjudication or notice and comment rulemaking. Said interpretations such as those in opinion letters, like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law, do not warrant chevron style deference. Instead interpretations contained in formats such as opinion letters are entitled to respect under our decision in skidmore v swift, but only to the extent that those interpretations have the power to persuade.

b) **US V MEAD CORP, SC 2001**

i) Question here is whether a tariff classification ruling by the US customs service deserves judicial deference. Court holds that a tariff classification has no claim to judical deference under chevron, there being no indication that congress intended such a ruling to carry the force of law, but we hold that under skidmore, the ruling is eligible to claim respect according to its persuasiveness.

ii) We hold that administrative implementation of a particular statutory provision qualifies for chevron deference when it appears that congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.

iii) **The level of deference varies with the circumstances, and courts have looked to agencies care, consistency, formality, relative expertise, and persuasiveness of their position.**

iv) Skidmore- the weight accorded to an administrative judgment in a particular case will depend upon the thoroughness evidence in its consideration, the validity of its reasoning, its consistency with earlier rulings, and all factors which give it power to persuade if lacking power to control.

v) Congress may implicitly delegate power to an agency. In this situation, you would expect the agency to be able to speak with the force of law when it addresses statutory ambiguities. The congressional delegation gave no indication that congress meant to delegate authority to customs to issue classifications rulings with the force of law.

vi) In situations where *Skidmore or Chevron* will apply, turns on whether the ruling will have force of law. If has legally-binding force, then judged under Chevron. If no legal force, then Skidmore will apply (these were just ruling letters)
vii) Scalia dissent- To decide case, scalia would follow chevron. Must be accepted by courts if reasonable. Would uphold.
agencies construction. Says now judges can decide ambiguities in laws instead of agencies.

c) Notes-
i) Why the difference- based on the different procedure used between formal and informal statements. More reason to rely on
a determination when more procedure was used to reach that result. After notice and comment, have heard what public has
to say. With informal interpretative rules, just a statement by agency without public input. So less reason to defer. Agency
cant exercise its expertise if it hasn’t heard all sides and opinions.

ii) There is a two track structure. Informal pronouncements by agencies will be judged by stricter standards than chevron. But
generally things don’t get to court anyway unless they have the force of law. So informal pronouncements are rarely
litigated.

iii) Under mead, chevron certainly governs interpretations that agencies adopt in formal adjudication, but its applicability to
informal adjudications will apparently depend on the statutory scheme in question. In adjudicative situations with highly
structured evidentiary presentment, chevron applies. INS v. Aquirre-Aquirre. But consider PBGC v LTV corp case where
court upheld agency imposition of billion dollar liability on employer without adequate opportunity to offer counter evidence.

4) Issues of discretion in adjudication

i) A great variety of admin action is judicially reviewed under 706(2a) of the APA : arbitrary, capricious, an abuse of discretion,
or otherwise not in accordance with law. this standard of review is referred to as the arbitrary and capricious standard.

ii) After looking at whether they are within their statutory authority and their interpretation is ok, then look to examine their
decision and application of their standards.

b) SALAMEDA V IMMIGRATION AND NATURALIZATION SERVICE, 1995, 7TH

i) Issue is whether the INS officers addressed in a rational manner the questions the aliens tendered for consideration. The bd
totally ignored the issues of the community service and hardship to the children. The child is constructively deported
because he must stay with his parents, so he should be included in the decision. The INS cannot disregard the impact on the
child. And the bd seemed to consider community service irrelevant as a matter of law. They must consider these factors, and
since they didn’t, their decision is not rationally related to the issues that were presented to them.

ii) What if it’s a new administration and they want to change their standards. Don’t have to look at community service. That’s
fine, but must explain why they are departing from precedent. Don’t want similarly situated people dealt with differently.

iii) Dissent- An easy case. There may be a hardship here, but obviously no extreme hardship. The only hardship is that they
prefer to stay here cause their kids will be happier. Not at risk for harm. No oppression in philippines. Some hardship, but
certainly not extreme. The agency is entitled to take the word extreme literally.

c) Citizens to Preserve Overton Park—Congress prohibited the use of parks for highways unless “there is no feasible and prudent
alternative” route. The court interpreted the statute to mean that the Secretary could not approve a parkland route unless each
alternative route was unsound from an engineering point of view (not “feasible”) or would present “unique problems” (not
“prudent”). The Secretary did not explain why there was no feasible and prudent alternative route. If the Secretary applied this
test, the proper standard for review by the district court was arbitrary and capricious. The court is first required to decide
whether the Secretary acted within the scope of his authority. Section 706(2)(A) requires a finding that the actual choice made
was not “arbitrary, capricious, an abuse of discretion.” To make this finding the court must consider whether the decision
based on a consideration of the relevant factors and whether there has been a clear error of judgment. The court is not
empowered to substitute its judgment for that of the agency. However, if the agency failed to consider a relevant factor, or
took account of a factor it should not have considered, its action should be set aside as arbitrary and capricious.

i) “Substantial evidence” review applies only to formal rulemaking or formal adjudication, and the decision in Overton
Park was neither. Although a hearing was required, it was merely a public hearing for the purpose of informing the
community about the project and eliciting its views. Such a hearing is not designed to produce a record that is to be the
basis of agency action—the basic requirement for substantial evidence review.

d) Notes-
i) Questions of legal interpretation include determination of which factors a statute require the agency to consider and which
ones it should not consider. If the agency failed to consider a relevant factor or considered a factor it shouldn’t have, that
should be set aside as AC.

ii) Butz v Glover livestock case- agency imposed 20 day suspension for misweighing livestock, even though int eh past it had
never suspended a license. Held ok because the agency’s choice of sanction is not to be overturned unless found to be
unwarranted in law or without justification in fact. The fashioning of a remedy is for the secretary, not court.

iii) Checklist of agency errors that can constitute an abuse of discretion- Action rests on a policy judgment that is unacceptable
as to render action arbitrary; Reasoinsing is illogical; Factual assertions do not withstand scrutiny under relevant standard of
review; Action is inconsistent with precedent without good reason; Failed to adopt an alternative solution to problem;
Decision doesn’t rest on reasoned decision making.

iv) Chenery rule- a court cannot affirm an agency decision on some ground other than that relied on by the agency in the
decision under review. No post hoc rationalizations.

v) In allentown case, the standard actually applied by agency, was different from the standard it seemed to be applying. The evil
of a decision that applies a standar other than thant eh one it enunciates spreads in both directions, preventing consistent
application of the law by subordinate agency personnel and effective review by the cts. An agency should not be able to
impede judicial review and political oversight by disguising its policymaking as fact finding.

e) Closed or open record
5) Issues of discretion in rulemaking

a) MOTOR VEHICLE MANU ASSN V STATE FARM MUTUAL AUTO INS, 1983
i) Court said made under informal rulemaking of 553 of APA. Subject to arbitrary and capricious, abuse of discretion, or otherwise not in accordance with the law standard. That is test court applies. Agency says their decision to rescind the rule should be treated same as deciding not to make a rule which is a narrower test.
ii) Agencies have power to rescind and amend their rules. Not implemented forever. But the presumption shouldn’t be, as the agency asks, against regulation. It should be against changes in the current policy.
iii) Important factors court laid out- this is the black letter formula- Normally an agency rule would be arbitrary and capricious if the agency has relied on factors which congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. The reviewing court should not attempt itself to make up for such deficiencies.
iv) reviewing court should not attempt itself to find the agencies reasoned basis. it must given by agency when decision made.
vi) Court is also saying four years ago you thought air bags were a good idea. And you can change your mind on it. but you adopted it as a rule and if you want to get rid of it, must give a reasonable explanation of why you want to get rid of it. not saying they must adopt airbags, just that they must explain why they don’t want them.

b) BORDEN V COMMISSIONER OF PUBLIC HEALTH, 1983 MASS- state soft look review
i) Agencies power is delegated by the congress and statute. An agency may base its regualtory decisions on same kinds of legislative facts as a legislature in making stauttes. A regulation is essentially an expression of public policy.
ii) Issue is not whether the regulation is supported by substantial evidence in record. Instead, the challenger must prove that the regulation is illegal, arbitrary or capricious. 
P must prove absence of any conceivable ground upon which rule may be upheld. Rules have the force of law. courts must apply rational presumptions in favor of validity and cannot declare it void unless no reasoanble construction can have it in harmony with the legislative mandate. Action by agency upheld.

iii) Defenders of hard look review state that by forcing an agency to articulate the reasoning actually facilitates the democratic process

iii) Baltimore gas and elec case- SC- upheld a rule adopted by nuclear reg comm which was premised on a conclusion aht permanent storage aof nuclear waste would have no significant environmental impact. Agency is making predictions in area of its expertise. That’s ok. this type of expert decision is entitled to most deference. This case is distinguishable from state farm case because ti is more scientific.

iii) Checkosky v SEC, DC- court split over whthehr court has power to remand an agency action without vacating it. dissnenting judge claimed remanding violated the APA. The language of APA would seem to agree with dissent, but maybe majority reaches correct result.
iv) In a number of statutes, congress has called for substantial evidence judicial review of agency action. Normally applies to formal adjud or rulemaking. Probably, judicial review under a substantial evidence standard is no different than under an ACS. Btoh call for reasoanble review and both require a sufficient factual basiss in record for the result agency reached by agency. However, when congress specifically calls for substantial evidence review, it wants more rigorous scrutiny.
v) State law- Borden represents deferential approach taken by most states. Requires that a rule be upheld if conceivable basis for it. also, agency isnt required to explain rule at time it was adopted in many states, but can do so on review.

Notes-

i) Essentially, under the hard look test, the reviewing court scrutinizes the agencys reasoning to make certain that the agency carefully deliberated about the issues raised by its decision. Courts require that agencies offer detailed explanations for their actions. The agencys explanation must address all factors relevant tot eha gencys decision. A court may reverse a decision if the agency fails to consider plausible alterantive measures and explain why it rejected these for the regulatory path it chose. If an agency route veers from the road laid down by precedents, it must justify the detour in light of changed external circumstances or a changed view of its regulatory role that the agency can suport in its enabling statute. The agency must all broad participation in the regulatory process and not disregard the views of any participants. In addition tot hese procedural requirements, court have, on occasion, invoked a rigorous standard by remanding decisions that the judges believed the agency failed to justify adequately in light of info in the admin record.
ii) State law- Borden represents deferential approach taken by most states. Requires that a rule be upheld if conceivable basis for it. also, agency isn't required to explain rule at time it was adopted in many states, but can do so on review.
Chapter 9- The availability of judicial review

1) Reviewability - statutory preclusion
   a) PRECLUSION OF JUDICIAL REVIEW
      i) Although there is a presumption that administrative action is subject to judicial review, that presumption can be rebutted. The legislature can preclude judicial review, thus rendering admin action partially or completely unreviewable. APA 701a1 and 1981MSAPA 5-102a and 1-103b
   b) BOWEN V MICHIGAN ACADEMY OF FAMILY PHYSICIANS, SC 1986
      i) Court begins with a strong presumption that congress intends judicial review of administrative action. Judicial review of a final agency action by an aggrieved person will not be cut off unless there is a persuasive reason to believe that such was the purpose of congress. Bill must upon its face give clear and convincing evidence of an intent to withhold judicial review.
      ii) In Erika case, we held that the failure to authorize further review for determinations of the amount of Part B awards provides persuasive evidence that congress deliberately intended to foreclose further review of such claims. The legislative history disclosed a purpose to avoid overloading the courts with trivial matters, a consequence which would unduly tax the fed ct system with little real value to the program. But that case is inapplicable here.
      iii) The presumption in favor of having judicial review has not been overcome by the govt. they say statute simply didn’t deal with this issue, so must have jdecial review.
   c) Notes
      i) Hierarchy of Reviewability — From Most Reviewable to Least Reviewable: Constitutional Grievances; Administrative Rules; Legal Challenges; Factual Challenges; Application of Law to Facts
      ii) A statute providing that certain agency action shall be final is often read to permit review of the action on some grounds or by some means. Shaughnessy case- shall be final means final in adin branch but doesn’t preclude judicial review.
      iii) McNary v haitian refugee center- class action raised const and statutory challneges to INS action. Statute precluded judicial review except in context of deportation order. Court held that district court had jurisdiction to hear the matter. Said preclusion only applied to individual claims , but to class actions challenging INS practice in general. As a practical matter, individual judicial review would be virtually useless.
      iv) Czerkes case- P challenging decision made by agency. Said it denied him SubDP because agency reached wrong result. Just cause you make const argument doesn’t mean it’s a const dispute. Really just a factual dispute. Shouldn’t be decided by court cause not a const claim. But court held differently and heard const clam in split decision.
      v) Can congress const prohibit review. Is that a violation of DP. General view is that if congress cuts off any nonconst claim, no problem. but if raising a real const claim, court must here it.

2) Reviewability- actions committed to agency discretion
   i) Section looks at action which is unreviewable because it is committed to agency discretion by law. 701a2. APA contemplates two kinds of agency discretion- which which is reviewable under 706(2A under AC standrd and that which is not reviewable at all.
   b) HECKLER V CHANEY, SC 1985- P sentenced to death by lethal injection case. FDA refused to act.
      i) Judicial review portions of APA- any person adversely affected or aggrieved by agency action, see 702, including a failure to act, is entitled to judicial review thereof; as long as the action is a final agency action for which there is no other adequate remedy in a court, see 704. The standards to be applied on review are governed by the provisions of 706. But before any review at all may be had, a party must first clear the hurdle of 701a. that section provides that judicial review applies, according tot eh provisions thereof, except tot eh extant that 1) statutes preclude judicial review, or 2) agency action is committed to agency discretion by law.
      ii) Important- Under 701a1 congress must express intent to preclude judicial review. Und a2, review is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agencies exercise of discreiten. In such a case, the statute can be taken to have committed the decisionmaking to the agencys judgment absolutely. This construction avoids conflict with the abuse of discretion standard of review in 706- if no judicially manageable standards are available for judging how and when an agency should exercise its discretion then it is impossible to evaluate agency action for abuse of discretion.
      iii) Reasons for unsuitability of review-
         1) First, agency decisions involve complicated balancing of factors within agencies expertise. Agency must assess whether a violation has occurred and evaluate their resources. Agencies can do this better than courts.
         2) Second, when an ageney refuses to act it generally does not exercise its coercive power over an individuals liberty or property rights, and thus does not infringe upon areas courts are supposed to protect.
         3) This is only presumptively unreviewable. Presumption may be rebutted where the substantiative statute has provided guidelines for the agency to follow in exercising its enforcement powers.
   c) Notes
      i) Dunlop v bachowski case- statute said agency shall do something. Thus, statute withdrew agency discretion. In contrast, this statute said agency has authority to do something. Huge difference.
      ii) From a policy perspective, its kind of like prosecutorial discretion. But not everyone agrees with prosecutorial discretion.
      iii) Best argument from chaney has to do with resource allocation and that those decisions are best made by agency.
      iv) Regulations already made can sometimes provide necessary standards for review because they have the force of law.
v) What if they have already conducted a rulemaking proceeding and decide not to do anything. He says strong case for having review where. Much to review and already spent resources. Harder situation is where he asks for rulemaking and agency ignores them. Here, you can argue that agencies can decide how to spend their resources.

vi) Once there is agency action, things become more reviewable. For example, if they give reasons for refusing to act. If those reasons conflict with statute, then there are reviewable standards. But that may give incentive for agencies not to answer.

vii) Scalia rejects the law or apply test. Levin agrees. Levin also rejects second factor from cheney.

viii) While the exception under 701a2 is said to be narrow, the court has expanded it.

(1) Dalton case—pres decision to accept or reject a list of military base closings proposed to him.
(2) Lincoln—agencies decision not to continue to fund health program out of its lump sum appropriation.
(3) Brother of locomotive engineers case—agencies refusal to reconsider its own decision.

(4) Webster case—CIA’s directors decision to terminate an employee.

3) Standing— in fact and zone of interests
   i) justiciability—under art 3, a fed ct can only entertain cases or controversies. Standing doctrine is also statutory
   ii) Standing requires three showings: Injury in fact, zone of interests, and that the court can redress their injuries.
   iii) FCC v snders brothers radio station- FCC granted a radio license to compete with station owned by P. Statute said anyone whose interests are adversely affected could seek review. Court made clear that Congress could confer such standing in order to promote pub int
   iv) §702—provides a person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

b) ASSOCIATION OF DATA PROC. SERVICE ORGS V CAMP 1970, SC
   i) First question is whether P alleges that the challenged action has caused him injury in fact, economic or otherwise. Ps have satisfied this test. Losing clients.
   ii) Second question is whether the interest sought to be protected is arguably within the zone of interest to be protected or regulated by the statute or const guarantee in question. Look to APA702. That interest may be aesthetic conservational or recreational or economic. Looks to statute and says it places them within zone of interests to be protected.
   iii) Remaining question is whether judicial review of action is precluded. Court says it is not. Ps are clearly within class of aggrieved persons who under 702, are entitled to judicial review of agency action. Ps have standing.
   iv) Brennen concurring—says first step of inquiry is only one necessary. Should only look to injury for standing.

c) Notes—
   i) Zone of interests—not meant to be particularly demanding; standing is found unless plaintiff’s interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit. Two-part inquiry: first, determining which interests the statute arguably protects, and second, determining whether the agency action affects those interests.
   ii) Zone of interest test applied in NCUA case—5-4 court held that banks had standing because the common bond provision was intended to limit the market that a credit union could serve. The banks wanted to limit the credit unions form entering additional markets. That link provided some indication that the interests of banks were arguably within the zone of interests protected by the statute.
   iii) Zone of interests test is not always toothless—air courier case. Failed zone of interest test even though they met unjury in fact test. The two are separate tests.
   iv) Unlike injury in fact test, which is const, the zone of interests test is prudential meaning that congress could abolish it. Bennett case—congress in statute said any citizen can bring suit, thus congress there abolished zone of interest test.
   v) Air courier case—agency decided to do more by air. Postal workers were complaining they’d lose jobs and brought suit. But court said not in zone of injury cause law intended to improve mail, not to protect the postal workers. What if another statute protects postal workers though. Is that enough. Court says no. Must be same statute.

4) Standing—causal connection and public actions
   a) Lujan v Defenders of Wildlife, SC 1992
      i) Injury in fact Test—const minimum contains 3 standards—
         (1) First, P must have suffered an injury in fact, an invasion of a legally protected interest which is a) concrete and particularized and b) actual or imminent, not conjectural or hypothetical.
         (2) Second, there must be a causal connection between the injury and the conduct complained of- the injury has to be fairly traceable to the challenged action of the D, and not the result of the indpenednt action of some third party not before the court.
         (3) Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. Party bringing suit has burden of establishing these elements.
      ii) Standing is not a theoretical argument, but requires perceptible harm. Would be enough if person who works with one of these animals brought suit. But cant speculate about injury.
      iii) Procedural injury—
         (1) The so called citizen suit provision of ESA provides that any person may commence a civil suit on his own behalf. Ps claim this gives procedural right for all to bring claim. Court rejects this view. Does not state an art III injury. Const.
         (2) Nothing in this contradicts the principle that the injury required by art 3 may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing. It is clear, though, in suits against govt, the concrete injury requirement must remain.
iv) Court is saying that if you let these Ps go to court then they can tell the agency what to do through the courts. But isn’t that what congress wanted by making act and they make laws enabling agencies.

v) Kennedy concurring: Congress has power to define injuries, and doesn’t read courts opinion to suggest a contrary view. But in exercising this power congress must at least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit. Statute here doesn’t meet these provisions because it does not establish that there is an injury in any person by virtue of any violation.

b) Hypo
i) Challenging a competitor license application. Claims weren’t given chance to cross examination. It is speculative if cross examination would have gotten you anywhere.

ii) Lujan FN 7- exception to redressability requirement. Don’t have to show that procedure denied would have done you any good. Do have to show that govt action would hurt you, but not that procedure would benefit you.

c) Notes-

i) Hunt v Washington apple advertising commn- an association has standing to sue on behalf of its members when a) one or more of its members would otherwise have standing to sue in their own right b) the interests the association seeks to protect are germane to the organization’s purpose and c) neither the claim nor the relief requested requires the participation of individual members in the lawsuit. In practice, latter two are easily met, so org can normally bring suit if it can identify one member who has standing.

ii) Sierra club v Morton case- court held no standing because failed to allege that any members suffered an injury. historic commitment to conservation was not enough. But then they amended their complaint and said some members camped their, so they had standing.

iii) Must also show causation. Injury in fact must be fairly traceable to the conduct complained of and also that it is likely that the injury will be redressed by a favorable decision. These requirements often pose difficulty when the P is a beneficiary of the statutory scheme, rather than an object of regulation.

iv) Numerous cases have applied the causation and remediability tests to deny standing to Ps in public actions. Steel co v citizens for a better environment. Court held that none of the environmental injuries in fact claimed by the orgs members could be redressed by the payment of civil penalties to the treasury or by any other relief sought by the P. consequently, the Ps lacked standing.

v) In a subsequent case, however, environmental Ps who suffered injury in fact from mercury discharges into a river had standing to seek civil penalties that would be paid to the US treasury. The difference was that the Ps in the second case were seeking to deter future misconduct and the payment of penalties would achieve this goal. friends of earth v laidlaw env services case.

vi) But causation and remediability barriers can be overcome. In Village of Arlington Heights v Metro Housing Development Corp, builder and low income housing buyers were granted standing to attack zoning laws. Demonstrated that the challenged law prevented construction of low income housing, an that the builder was prepared to build homes buyers could afford.

vii) Citizen suit provisions: The most important holding in Defenders of Wildlife is the invalidity of the citizen suit provision of the ESA. A large number of environmental and other statutes have citizen suit provisions; the defendants decision casts doubt on the validity of each provision. Court talks about it in terms of separation of powers. Asserting that the citizen suit provision amounts to legislative interference with the execs duty to take care of the laws execution. The Kennedy Souter concurrence doesn’t go that far though and they were the critical votes. They talked about how statute needs to be more specific as to what injury it is seeking to protect.

viii) FEC v Akins- held that akins had standing to challenge the FEC decision. The case can be read as undermining the requiemnt that the harm be particularized rather than generalized; after all, millions of voters suffered the same injury as P here. The court however held that in light of the specific statute and the concreteness of injury to akins, injury in fact had been sufficiently alleged. this distinguished the case from those in which the P alleged only harm of abstract nature.

ix) Taxpayer actions- in almost every state, TPs have standing to challenge the legality of action taken by the legislature or the executive branch which they allege involves unlawful expenditure of funds. DC common cause v DC case. DC taxpayer has standing to challenge unlawful expenditure by municipal govt.

x) In constrast to experience at the state level, at the federal level recognition of TPs actions has been extremly grudging. A fed TP ordinarily lacks standing to challenge the expenditure of federal funds unless it can be demonstrated that a victory on the merits will reduce the amount of taxes the TP is required to pay.

5) Timing- finality

a) four different timing doctrines. Each serves a different function and has a different set of case law.

i) The final order rule- litigants ar sometimes dissatisfied with decisions taken by the agency during the admin process. However, as a general rule, courts review only final orders. This means that ordinarily- but not always- a litigant must complete the entire admin process before a ct will review decisions which the agency took along the way.

ii) Ripeness- a private party may be threatened by agency action which has not occurred yet. For example, an agency might adopt a new rule, but not actually enforce it against the P. in many cases, but not always, such disputes arc enot ripe for review. This means that a court will await concrete application of the rule before reviewing its legality.

iii) Exhaustion of remedies- a private party ma have an admin remedy available which has not yet been employed. It is possible that this remedy might be successful; the partys position might preveil and solve the problem. nevertheless, the party wants to go immediately to court. By general rule, but not always, a court will not hear the case until party has exhausted all admin remedies.
iv) Primary jurisdiction- in many situations, both a trial court and an agency have jurisdiction to deal with a particular problem. If the doctrine of primary jurisdiction applies, the trial court refrains from acting so that the matter can be brought to the agency. Thus the courts become involved only by judicially reviewing the agency decision, as opposed to conducting the original trial.

b) FTC v SOCAL, SC 1980
   i) FTC issued complaint against Socal averring that it had reason to believe they were engaging in unfair competition methods. Socal moved to dismiss and was denied by FTC. With charges still pending before ALJ, Socal filed complaint in court seeking review of whether agency had reason to believe it was violating the act.
   ii) It wasn’t final agency action. Its stating it has reason to believe a violation, is not a definitive statement. Just means that further inquiry is needed. It has no legal force nor major effect on Socal’s business. Socal says it creates a large burden cause they have to respond to the charges. Court rejects this claim. Every party could make this claim.
   iii) Judicial intervention into the agency process denies the agency an opportunity to correct its own mistakes and to apply its expertise. Intervention also leads to piecemeal review which at the least is inefficient and upon completion of the agency process might prove to have been unnecessary.
   iv) Socal argues they will be irreparably harmed. Court says not a substantial enough burden. The expense and annouance of litigation is part of the social burden of living under govt.

c) Notes-
   i) Bennett v spear case- two conditions must be satisfied for agency action to be final. First, the action must mark the consummation of the agency’s decisionmaking process- it must not be of a merely tentative or interlocutory character. And second, the action must be one by which rights or obligations have been determined or from which legal consequences will flow.
   ii) When a nonfinal order final- MSAPA 5-103 allows immediate review of a nonfinal order where postponement would result in an inadequate remedy or irreparable harm disproportionate to the public benefit derived from postponement. 704 contains a similar implicit exception. For example, bad environmental effects.
   iii) Catch 22- Franklin v mass- court held that the secretary of commerce’s action was not final and thus not reviewable under APA, because it was subject to review and revision by the president before it would have any direct and immediate effect on anyone. And the pres deision was not reviewable under APA because pres not an agency. So action not reviewable.
   iv) Heckler v day- a group of Vermont applicants for SS benefits bought a class action to force a speedup in claims processing. While congress was concerned about sluggish admin. of disability program, it had repeatedly rejected mandatory deadline shemes. So court rejected Ps claim and deferred to congressional judgment.
   v) Court can review agency’s failure to act, not withstanding final order rule.

6) Timing- ripeness
a) ABBOTT LABS V GARDNER, SC 1967
   i) FDA passed a regulation saying that when trade drugs are made, must print generic names on those packages. Agency made rule saying that every time trade name is used bust list generic rule. Drug makers claim that the every time language exceeded the agencies authority. Issue is over ripeness.
   ii) Basic rationale is to prevent courts, thorugh avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effect felt in a concrete way by the challenging party. Twofold aspect- requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.
   iii) Court holds issue is ripe- first, issue is purely legal to determine the congressional intent. Second, we find it to be final agency action within meaning of 704. They made the formal rule and it was definitive. Compliance was expected. The regulations have the status of law and violations have heavy criminal and civil sanctions.
   iv) Impact of the regulations upon petitioners is sufficiently direct and immediate as to render the issue appropriate for judicial review at this stage. Effects their day to day operations. Abbott can comply at heavy cost or not comply which might cost even more. And might lose public confidence in their drugs.
   v) Major difference between this and socal is that socal would interrupt a pending proceeding. No pending proceeding here.
   vi) Ripeness should be decided on two factors- fitness of the issue for judicial decision and hardship to parties for withholding court consideration.
   vii) Dissent- Said if you don’t allow review now, they will fall in line and can get protective measures in place. Allowing review will cause enjoining the rule for years. Fortas seems to be correct as history has shown. Takes years to get past challenges to rules. Enforcement is typically stayed until judicial challenges have run their course. Factually it is true that rules take a while to be implemented. Is that a bad thing. Not necessarily, but probably. Open pandoras box. The public interest in implementing congress program far outweighs the private interest. A much stronger showing is necessary than the expense and trouble of compliance and the risk of defiance. Fortas argument hasn’t won in courts though because if held otherwise, would force parties to follow statutes which may be very expensive for them, before they even know if statute will be upheld.
   viii) Toilet goods assn v gardner companion case- Held different. Based on different set of facts though. Although reg was final, case was not ripe. Postponing review would help court know about FDAs enforcement problems. Also, less degree of hardship to Ps. No irremediable adverse consequences.

b) Informal agency action

c) Informal agency actions
i) What if the pronouncement doesn’t have the force of law. Not a rule. Can you have challenge then preenforcement. Not normally considered ripe for review.

ii) What is the problem with letting them get review of interpretative rules? They may not give advice.

iii) National automatic laundry case - read to say that a letter from agency head is kind of like final action, so it may be reviewable. But can it get riper than the letter? Maybe once they try to enforce it.

iv) It may depend on whether there is an immediate impact by the position. And if its from agency head, could normally be considered final action. It’s a grey area.

d) Notes-

i) Under Abbott and toilet goods, most but not all legislative regulations are deemed ripe for preenforcement review. Nonlegislative rules like interpretive rules and policy statements are not normally considered ripe until clarified and enforced. Some cases have held them ripe for review though.

ii) Cases setting limits on Abbott preenforcement review-

   (1) Reno v catholic social services - statute allowed certain undocumented aliens to apply for permanent residence. But a regulation said that any absence from US over last few years excludes you. The court refused to entertain a challenge to the INS regulation before it was applied to particular aliens, since the regulation did not impose any penalty for violating its restrictions but merely limited access to a benefit created by the statute. As a result, aliens generically had to wait until they were ordered deported before they could challenge in court. There was a loophole though.

   (2) Thunder Basin Coal v Reich - held that congress intended to preclude preenforcement review of regulations under the mine safety act. Distinguished from Abbott because of the statutory language. Evidence was that the statute provided an elaborate post enforcement administrative procedure which could address claims of invalidity of the regulation, plus concerns about delays risking safety of miners.

iii) Because of Abbott, congress assumes that most rules will be challenged before they are enforced, so they made a short statute of limitations for such challenges. But this short time can disadantage those who didn’t know about law. Some cases do allow a challenge to a rule when it is actually applied to P, even after time expires, on theory that the limitation provision was intended only to preclude preenforcement judicial review of the statute, not an as applied challenge.

iv) MSAPA 5-111 - sets forth factors to consider in granting a stay. Fed law calls for a similar balancing.

   (1) Likelihood the applicant will prevail on merits

   (2) Whether the applicant will suffer irreparable injury

   (3) Whether relief will substantially harm other parties

   (4) Whether the threat to public health safety or welfare relied on by agency is not sufficiently serious to justify the agency's refusal to grant a stay.

v) Legal issues are generally seen as more fit for judicial review, but if it is unknown how the rule will be applied, then the courts may wait.

vi) Factual issues are generally seen as less fit for judicial review. However, rules may be challenged on factual issues because the court needs to look at the record before the court.

7) Timing- exhaustion of remedies

a) MCCARTHY V MADIGAN 1992 SC- federal prisoner case where he needed medical attention

   i) Of paramount importance to any exhaustion inquiry is congressional intent. Where congress specifically mandates, exhaustion is required. But where congress has not clearly required exhaustion, sound judicial discretion governs.

   ii) General rule is that parties exhaust administrative remedies before seeking relief in court. Exhaustion is required because it serves the twin purposes of protecting administrative authority and promoting judicial efficiency. Agencies, not the courts, ought to have primary responsibility for the programs that congress has charged them to administer. The exhaustion doctrine also purpose that an agency ought to have an opportunity to correct its own mistakes with respect to the programs it administers. Exhaustion applies most strongly when frequent and deliberate flouting of administrative processes could weaken an agency’s effectiveness by encouraging disregard of its procedures. Promotes efficiency in two ways- if agency corrects their own errors, judicial review will be moot so avoids piecemeal decisions. Also agency decision produces useful record for judicial consideration.

   iii) In determining whether exhaustion is required, fed cts must balance the interest of the individual in retaining prompt access to a fed judicial forum against countervailing institutional interests favoring exhaustion.

   iv) Three broad sets of circumstances when the interest of individual weigh heavily against requiring administrative exhaustion.

      (1) requiring exhaustion may occasion undue prejudice to later claims in court, such as irreparable harm.

      (2) Admin remedy may be inadequate because of some doubt as to whether the agency was empowered to grant effective relief. If agency lacks institutional competence to resolve particular issue, such as constitutionality of a statute.

      (3) Admin remedy may be inadequate when the administrative body is shown to be biased or has otherwise predetermined the issue before it.

   v) Held reviewable because even if he exhausted, no remedy available through administrative process. Seeking financial damages.

b) NEW JERSEY CIVIL SERVICE ASSN V STATE 1982 NJ - had to do with appts of ALJs and former employees

   i) AGs advise did not count as final agency action subject to review. However, agency followed the advice and that was final action by agency.

   ii) Principal aim in avoiding premature review of administrative determinations has been to protect the court from becoming entangled in abstract disagreements over administrative policies, and also to refrain from judicial interference until an administrative decision has been formed and its effects felt in a concrete way by a challenging party. Agency action here is final and felt directly by Ps. In deciding their claim, doesn’t intrude into agency policymaking.
iii) Rule provides against judicial review before agency exhaustion but there are exceptions. Such as when admin remedies would be futile, irreparable harm would result, jur of agency is doubtful, or overriding pub interest.

c) Notes-
   i) McCarthy is exceptional. Most litigants are required to exhaust all available remedies before going to ct, even though the remedies may seem slow, costly frustrarint and useless. Portela-gonzalez case.
   ii) Portela gonzalez case- To excuse exhaustion of remedies requirement, **claimant must show that it is certain** that their claim will be denied on appeal, not merely that they doubt an appeal will result in a different decision.
   iii) Reliance on the exception in a given case must be anchored in demonstrable erality. A pessimimistic prediction or a hunch that further admin proceedings will prove unproductive is not enough to sidetrack the exhaustion rule. Claimants who seek safe harbor under the futility exception must show that it is certain that their claim will be denied on appeal, not merely that the doubt an appeal will result in a diff decision.

iv) Factors in judicial balance of whether to excuse a failure of exhaust-
   1. Nature and severity of harm to P from delayed review
   2. Need for agency expertise in resolving the issue
   3. Nautre of the issue involved
   4. Adequacy of the remedy in light of Ps particular claim
   5. Extent to which the claim appears to be serious rather than a tactic for delaying the agency process.
   6. Apparent clarity or doubt as to the resolution of the merits of Ps claim
   7. Extent to which exhaustion would be futile because an adverse decision is certain
   8. The extent to which P had a valid excuse for failure to exhaust

v) Myers v bethlehem shipbuilding- P in NLRB proceeding argued agency had no jur over them and sought judicial intervention to stop hearing. Held- no one is entitled to judicial relief for a supposed or threatened injury until the prescribed admin remedy has been exhausted. That rule has been repeatedly acted on in cases where, ashere, the contention is mdade that the admin agency lacked jur.

vi) Many states allow courts to rule on questions of law or jur before exhaustion.

vii) Darby v cisneros case-
   1. Held that although last sentence of 704 is written in terms of finality, it must also be intended as an exception to the exhaustion rule. In darby, HUD rules provided that a party could appeal an ALJ decision, but did not require such an appeal. As a result, court held that darby could seek jud review of an adverse ALJ decision without bothering to appeal.
   2. Basically says- if agency wants to require intraagency exhaustion of those steps, must pass a rule. Cause APA doesn’t require exhaustion. But if they don’t adopt sucha rule, don’t need to appeal within agency to exhaustion.

viii) The general rule is that an agency lacks authority to determine the constitutionality of statutes. As a result, a party who launches an on the face challenge of const of a statute is not rquired to exhuast remedies. However, if a statute requires exhaustion, a court is likely to insist on it. also, exhaustion may be required if the case presents both const and nonconst issues, since party may win on nonconst issue making appeal moot. Also, exhaustion is normally required for as applied challenges, rather than facial challneges.

d) Patsy v Fla bd of regents- court considerd whether exhaustion of state remedies was required before bringing a civil rights suit under fed ct 1983. SC held that a 1983 P is never required to exhaust state remedies, no matter how adequate or easily exhausted those remedies might be.